United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

Orig w/ affidavit of mailing

76-1569

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1569

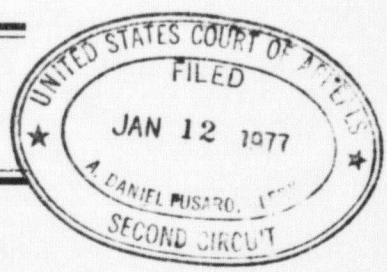
UNITED STATES OF AMERICA,
Appellant,

—against—

HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE and JOSEPH SCHNITZER,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX



DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

PAGINATION AS IN ORIGINAL COPY

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RICT COURT — CRIMINAL DOCKET

JUDGE/MAGISTRATE: Assigned Trial 0715 Disp./Sentence — 207 District | 1 Office

• U.S. vs. HERMAN BANERMAN defendant

Case Filed: Day 11 Mo. 12 Yr. 75 — Docket No. 75 CR 1065 — Def. 1 — No. of Defents 7

71-944

MAGR. CASE NO. 75M1505

CHARGES		
18:659	Did possess goods stolen from interstate shipment	1
18:371	Did conspire to possess goods stolen from an interstate shipment	1

BAIL & RELEASE: ☐ Denied ☐ Personal Recog ☐ Unsecured Bond AMT Set (000) $ 15 ☐ Conditional Release ☐ 10% Deposit ☒ Surety Bond ☐ Collateral ☐ 3rd Party Custody ☐ PSA ☐ Bail Not Made ☐ Bail Status Changed (See Docket)

ATTORNEYS

Alvin Schall

Carl Bernstein
485 Madison Ave. NYC.10022
980-3890

ARREST	INDICTMENT ☒ Information ☐	ARRAIGNMENT	TRIAL	SENTENCE
9/3/75 U.S. Custody Began on Above Charges F.B.I. ☐ Prosecution Deferred	☐ High Risk Defn. & Date Design'd 12/11/75 Waived ☐ Superseding ☐ Indict/Info ☐	12/16/75 1st Plea ☐ Not Guilty ☐ Nolo ☐ Guilty Final Plea ☐ Not Guilty ☐ Nolo ☐ Guilty	Trial Set For 5/10/76 Voir Dire ☐ Trial Began ☐ J ☐ N Trial Ended	Disposition ☐ Convicted ☐ Acquitted ☐ Dismissed ☐ Nolled/Discontinued* ☐ On All Chgs ☐ On Lesser* Offense(s) ☐ WOP ☐ WP

		'DATE	INITIAL/No.		INITIAL/No.	OUTCOME
Search Warrant	Issued			INITIAL APPEARANCE 9/3/75		☐ Dismissed ☐ Held for District GJ ☒ Held to Answer to U. S. District Court
	Return					
Summons	Issued			PRELIMINARY EXAMINATION OR REMOVAL HEARING Date Scheduled 10/3/75 Date Held		BOND ☐ Exonerated ☐ To Transferee District
	Served			☒ Waived ☐ Not Waived	☐ Intervening Indictment	AT:
Arrest Warrant						
COMPLAINT		9/3/75	VAC 070A	Tape No.	INITIAL/No.	Magistrate's Initials
OFFENSE (In Complaint)		Violation of T-18, U.S.C. Sec. 659				

* Show last names and suffix numbers of other defendants on same indictment/information
CIOFFI-2,LEMANSKI-3,MENGRONE-4,MONTEVECCHI-5, SCHNEIDER-6, SCHNITZER-7

DATE	PROCEEDINGS	V. Excludable Delay (a)	(b)	(c)	(d)
12/11/75	Before MISHLER, CH.J.- Indictment filed				
12-18-75	Before WEINSTEIN J - case called - deft & atty present - deft arraigned and enters a plea of not guilty - bail contd- Bail limits as to above deft extended to New Jersey. Pre-Trial Conference set for Jan. 6, 1976 at 9:30 am.				
1-6-76	Notice of Appearance filed.				
1-6-76	Before WEINSTEIN J - case called - Pre Trial conference held and concluded - all defts waives speedy trial rule - trial set for May 10, 1976.				
2/20/76	Notice of readiness for trial filed				
2-24-76	Before WEINSTEIN J - case called - case called - deft not present - counsel present - defts motion to extend bail limits to Ontario, Canada is granted - So Ordered.				
4-7-76	Notice of Motion filed, ret. 4-13-75, for an order requiring deft to submit handwriting exemplars in the tenor and at a time and place, requested by agents of the F.B.I.				
4-13-76	Before WEINSTEIN J - case called - counsel present - motion for handwriting exemplars argued and granted - So Ordered.				
4-29-76	Letter filed received from Chambers dated 4-27-76 from Carl D. Bernstein, Esq. for delay on date for trial May 10, 1976 no later than 12 o'clock. Delay granted -So ordered by Judge Weinstein				

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) — "SPEEDY TRIAL ACT".

A

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE (a)	(b)
5-10-76	Before WEINSTEIN J - case called - defts not present - counsels present - all defts waive speedy trial rule - defts application to adjourn trial date to 9-20-76 at 10:000 am is granted.		
6-21-76	Before PRATT, J - case called - counsel present - adjd to 8-26-7 for status conference		
8/2/76	Before PRATT, J. - Case called. Counsel present. Adjd to 9/20/76 at 10:00 a.m. for trial.		
9/16/76	Govts mem of law in opposition to motion to suppress filed.		
9/20/76	Before PRATT, J.- Case called. Deft & Counsdl present. Adjd to 9/21/76 at 10:00 a.m. for criminal hearing & commencement of trial.		
9-21-76	Before PRATT, J. - Case called. Deft & counsel present. Adj'd to 9-23-76 at 10 A.M. for suppression hearing.		
9/23/76	Before PRATT, J. - Case called. Deft &Counsel present. Suppressio hearing ordred and begun. Hearing continued on 9/24/76 at 10:00 a.m.		
9-24-76	Before Pratt, J - case called - defts & atty present - suppression hearing contd - hearing contd to 9-27-76		
9-27-76	Before Pratt, J - case called - deft & counsel present - suppression hearing contd - contd to 9-28-76		
9-28-76	Before PRATT, J - case called - suppression hearing resumed - Govt rests - deft rests - hearing contd to 9-29-76.		
9-29-76	5 transcripts filed (pgs 1 to 857)		
9-29-76	Before Pratt, J - case called -		
9/29/76	Before PRATT, J.- Case called. Deft & Counsel present. Suppression hearing resumed. Motionto suppress - Motion argued , and motion granted. Adjd without date for trial.		
10-5-76	Stenographic transcript dated 9-29-76 filed.		
10/26/76	Notice of motion to re open suppression hearing with govts memo of law in support of mo tion to reopen suppression hearing filed, returnable 11/5/76 at 9:00 a.m.		
11-5-76	Before Pratt, J.- Case Called. Counsel present. Motion to Suppress argued. Motion denied.		
11-11-76	Stenographer's Transcript dated November 5, 1976 filed.		
11-22-76	By PRATT, J - Order filed that the motion to reopen the suppression hearing is denied; and further ordered that after a hearing on the motion for reargument, that the motion for rehearing is denied for the reasons stated in open court on Nov. 5, 1976.		
12/1/76	Notice of Appeal filed. (Govats)		
12/1/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.		
12-7-76	Notice of Ordering of Partial Transcript filed.		

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DISTRICT COURT — CRIMINAL DOCKET

JUDGE/MAGISTRATE: Assigned Trial 0715 | 207 District | 1 Office | Disp./Sentence

• U.S. vs. 75 CR 845-2

VINCENT F. CIOFFI — defendant

Case Filed: Day 11 Mo. 12 75 | No. of Defdnts 7

Docket No. 75-944

MAGR. CASE NO. 75M1505

CHARGES

18:659	Did possess goods stolen from an interstate shipment of goods 1
18:371	Did conspire to possess goods stolen from 1 an interstate shipment of goods

BAIL/RELEASE: ☐ Denied ☐ Personal Recog ☐ Unsecured Bond ☐ Conditional Release AMT Set (000) $ 15 ☐ 10% Depo ☐ X $ Bor ☐ Collateral ☐ 3rd Party Custody ☐ PSA ☐ date bail Not Made ☐ Bail Status Changed (See Docket)

U.S. ATTYS: Alvin Schall

DEFENSE COUNSL: x Nathaniel ~~Bickford~~, 30 Rockefeller ~~Plaza, NYC~~. Aaron Sacher ~~489-8230~~ 32 Court St. Bklyn, NY U1 5-1003

ARREST	INDICTMENT X	ARRAIGNMENT	TRIAL	SENTENCE
9/3/75 or U.S. Custody Began on Above Charges FBI	☐ High Risk Defn. & Date Design'd	Information ☐ 12/11/75 Waived ☐	12/18/75 1st Plea NG	Trial Set For 5/10/76 Not Guilty ☐ Nolo ☐ Guilty
☐ Prosecution Deferred	Superseding ☐ Indict/Info ☐	Final Plea	☐ Not Guilty ☐ Nolo ☐ Guilty	Trial Began ☐ J ☐ N Trial Ended

Voir Dire ☐ Disposition

Convicted ☐ On All Char. ☐ On Lesser* Offense(s) ☐ WOP. ☐ W.
Acquitted
Dismissed
Nolled Discontinued*

		*DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT		9/3/75	VAC 070A

INITIAL APPEARANCE 9/3/75 INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 10/3/75; Date Held

X Waived ☐ Not Waived ☐ Intervening Indictment

Tape No. INITIAL/No.

OUTCOME

☐ Dismissed ☐ Held for District GJ BOND ☐ Exonerated ☐ To Transferee District

X Held to Answer to U. S. District Court

AT:

Magistrate's Initials ▶

OFFENSE (In Complaint): Violation of T-18, U.S.C. Sec. 659

• Show last names and suffix numbers of other defendants on same indictment/information

BANERMAN-1, LEMANSKI-3, MENGRONE-4, MONTEVECCHI-5, SCHNEIDER-6, SCHNITZER-7

DATE	PROCEEDINGS	V. Excludable Delay (a) (b) (c)
12/11/75	Before MISHLER, CH.J.- Indictment filed	
12-18-75	Before WEINSTEIN J - case called - deft & atty present - deft arraigned and enters a plea of not guilty - bail contd. Pre Trial conference set for Jan. 6, 1976 at 9:30 am.	
1-6-76	Notice of Appearance filed.	
1-6-76	Before WEINSTEIN J - case called - Pre Trial Conference held and concluded - all defts waive speedy trial rule - trial set for May 10, 1976.	
2/20/76	Notice of readiness for trial filed	
3-29-76	Copy of letter filed received from Chambers dated 3-26-76 from Aaron R.Sacher, Esq. counsel for deft .	
4-7-76	Notice of motion filed, ret. 4-13-76, for an order requiring deft/s to submit handwriting exemplars, etc.	
4-13-76	Notice of Appearance filed	
4-13-76	Before WEINSTEIN J - case called - counsel present - motion for handwriting exemplars argued and granted -So Ordered	
5-10-76	Before WEINSTEIN J - case called - deft not present - counsel present - all defts waive speedy trial rule - defts application to adjourn trial date to 9-20-76 is granted.	
9/16/76	Govts memorandum of law in opposition to motion to suppress filed.	

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) — "SPEEDY TRIAL ACT".

C

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE D (a)	(b)
9/20/76	Before PRATT, J. _ Case called. Deft & Counsel present. Adjd to 9/21/76 at 10:00 a.m.for criminal hearing & commencement of trial.		
9-21-76	Before PRATT, J. - Case called. Deft & counsel present. Adj'd to 9-23-76 at 10 A.M. for suppression hearing.		
9/23/76	Before PRATT, J.- Case called. Deft & Counsel present. Suppression hearing ordered and begun. Hearing contd on 9/24/76 at 10:00 a.m.		
9-24-76	Before Pratt, J - case called - deft & atty present - suppression hearing contd - contd to 9-27-76		
9-27-76	Before Pratt, J - case called - deft & atty present - suppression hearing contd - contd to 9-28-76.		
9-28-76	Before PRATT, J - case called - suppression hearing resumed - Govt rests - deft rests - hearing contd to 9-29-76		
9=29=76	5 transcripts filed (pgs 1 to 857)		
9/29/76	Before PRATT, J.- Case called. Deft & Counsel present. Suppression hearing resumed. Motion to suppress Motion argued, and motion granted. Adjd without date for trial.		
10-5-76	Stenographich transcript dated 9-29-76 filed.		
10/22/76	Notice of motion to re open suppression hearing with Govts memo of law in support of motion filed, returnable 11/5/76 at 9:0		
11-5-76	Affidavit of Aaron Sacher filed; Deft CIOFFI's Memorandum in opposition filed		
11-5-76	Before Pratt, J.= Case Called. Counsel present. Motion to Suppress argued. Motion denied.		
11-11-76	Stenographer's Transcript dated November 5, 1976 filed.		
11-22-76	~~Before~~ By PRATT, J - Order filed that the motion to reopen the suppression hearing is denied; and it is further ordered after a hearing on the motion for reargument that the motion for rehearing is denied for the reasons stated in open court on 11-5-76		
12/1/76	Notice of Appeal filed (Govts).		
12/1/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.		
12-7-76	Notice of Ordering of Partial Transcript filed.		

A 5

DISTRICT COURT — CRIMINAL DOCKET

JUDGE/MAGISTRATE: Assigned Trial 0715 | 207 District | 1 Office | Disp./Sentence

U.S. vs. 75 CR 345-3 KENNETH R. LEMANSKI defendant

Case Filed: Day 11 Mo. 12 | No. of Defdnts 7

Docket No. 75 [illegible] 945 | Def. 3

75-944

MAGR. CASE NO. 75M1505

CHARGES

18:659	Did possess goods stolen from an interstate shipment	1
18:371	Did conspire to possess goods stolen from an interstate shipment	1

BAIL & RELEASE: ☐ Denied ☒ Personal Recog ☐ Unsecured Bond ☐ Conditional Release; AMT Set (000) $ 10; date; ☐ Bail Not Made ☐ Bail Status Changed (See Docket); ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Party Custody ☐ PSA

YS U.S. Atty: Alvin Schall

Def. Counsel: Lawrence Hochheiser by L.Cohen, 16 Court St., Bklyn, NY. 875-4268

ARREST	INDICTMENT ☒ / Information ☐	ARRAIGNMENT	TRIAL	SENTENCE
9/3/75 or U.S. Custody Began on Above Charges: FBI	☐ High Risk Defn. & Date Design'd	12/11/75	10/18/75	Trial Set For 5/10/76
☐ Prosecution Deferred	Waived ☐	1st Plea	☒ Not Guilty ☐ Nolo ☐ Guilty	Voir Dire ☐
	Superseding ☐ Indict/Info ☐	Final Plea	☐ Not Guilty ☐ Nolo ☐ Guilty	Trial Began ☐ J ☐ N
				Trial Ended

Disposition: ☐ Convicted ☐ Acquitted ☐ Dismissed ☐ Nolled/Discontinued* ☐ On All Charges ☐ On Lesser* Offense(s) ☐ WOP. ☐ WP

		DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT		9/3/75	VAC 070A

INITIAL APPEARANCE 9/3/75 INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 10/3/75; Date Held ____; ☒ Waived ☐ Not Waived; ☐ Intervening Indictment

Tape No. INITIAL/No.

OUTCOME: ☐ Dismissed ☐ Held for District GJ; BOND ☐ Exonerated ☐ To Transferee District; ☒ Held to Answer to U. S. District Court

AT

Magistrate's Initials ▶

OFFENSE (In Complaint): Violation of T-18, U.S.C. Sec. 659

• Show last names and suffix numbers of other defendants on same indictment/information

BANERMAN-1, CIOFFI-2, MENGRONE-4, MONTEVECCHI-5, SCHNEIDER-6, SCHNITZER-7

DATE	PROCEEDINGS	V. Excludable Delay (a) (b) (c) (d)
12/11/75	Before MISHLER, CH.J.- Indictment filed	
12-18-75	Notice of Appearance filed.	
12-18-75	Before WEINSTEIN J - case called - deft & atty present - deft arraigned and enters a plea of not guilty-bail contd.	
-	Pre Trial Conference set for Jan. 6, 1976 at 9:30 am.	
1-6-76	Before WEINSTEIN J - case called - deft & counsel present - Pre Trial conference held and concluded - all defts waive speedy trial rule - trial set for May 10, 1976.	
1-15-76	Letter received from Chambers dated Jan. 14, 1976 re deft from Counsel Kenneth Aronson, filed.	
1-20-76	Notice of Motion filed directing evidentiary hearing prior to trial, suppressing evidence etc.(received from Chambers)	
2/20/76	Notice of readiness for trial filed	
4-7-76	Notice of motion filed, ret. 4-13-76, for an order requiring deft to submit handwriting exemplars, etc.	
4-13-76	Before WEINSTEIN J - case called - counsel for deft present - motion as above argued and granted - So Ordered.	
5-10-76	Before WEINSTEIN J - case called - deft not present - counsel present - all defts waive speedy trial rule - defts application to adjourn trial date to 9-20-76 is granted.	

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) — "SPEEDY TRIAL ACT".

E

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE D (a)	(b)
9/16/76	Govts memorandum of law in opposition to motion to suppress filed.		
9/20/76	Before PRATT, J. - Case called. Defts &Counsel present. Adjd to 9/21/76 at 10:00 a.m.for criminal hearing & commencement of trial.		
9-21-76	Before PRATT,J.- Case called. Deft :& counsel present. Adj'd to 9-23-76 at 10 A.M. for suppression hearing.		
9/23/76	Before PRATT, J.- Case called. Deft & Counsel present. Suppression hearing ordered and begun. Hearing contd to 9/24/76 at 10:00 a.m.		
9-24-76	Before Pratt, J -case called - deft & atty present - suppression hearing contd - contd to 9-27-76		
9-27-76	Before Pratt, J - case called - deft & atty present - hearing contd - hearing contd to 9-28-76		
9-28-76	Before Pratt, J - case called - suppression hearing resumed- Govt rests - deft rests - hearing contd to 9-29-76		
9-29-76	5 stenographers transcripts filed (pgs 1 to 857)		
9/29/76	Before PRATT, J.- Case called. Deft & Counsel present. Suppression hearing resumed. Motion to suppress- Motion argued and motion granted. Adjd without date for trial.		
10-5-76	Stenographic transcript dated 9629-76 filed.		
10/26/76	Notice of motion to re open suppression hearing with Govts memo of law in support of motion filed, returnable 11/5/76 at 9:00 a.m.		
11-5-76	Before Pratt, J.- Case Called. Counsel present. Motion to Suppress argued. Motion denied.		
11-11-76	Stenographer's Transcript dated November 5, 1976 filed.		
11-22-76	By PRATT, J - Order filed that the motion to reopen the suppression hearing is denied; and it is further ordered after a hearing on the motion for reargument that the motion for rehearing is denied for the reasons stated in open court on 11-5-76		
12/1/76	Govts Notice of Appeal filed.		
12/1/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.		
12-7-76	Notice of Ordering Of Partial Transcript filed.		

A 7

DISTRICT COURT – CRIMINAL DOCKET

JUDGE/MAGISTRATE: Assigned Trial 0715 Disp./Sentence | 207 District | 1 Office

U.S. vs. 75 CR [illegible]-4 FRANK P. MENGRONE defendant

Case Filed: Day 11 Mo. 12 | No. of Defdnts 7

Yr. 75 Docket No. 945 Def't 4

75-944

MAGR. CASE NO. 75M1505

CHARGES			
	18:659	Did possess goods stolen from an interstate shipment	1
	18:371	Did conspire to possess goods stolen from an interstate shipment	1

BAIL & RELEASE: ☐ Denied ☒ Personal Recog ☐ Unsecured Bond ☐ Conditional Release

AMT Set (000) $ 50 ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Party Custody ☐ PSA

date ☐ Bail Not Made ☐ Bail Status Changed (See Docket)

U.S. Attorney: Alvin Schall

Defendant's Counsel: x Frederick Abrams, 250 Broadway, NYC. 732-4200

ARREST	INDICTMENT ☒ / Information ☐	ARRAIGNMENT	TRIAL	SENTENCE
9/3/75 or U.S. Custody Began on Above Charges: FBI	High Risk Defn. & Date Design'd	12/18/75	Trial Set For: 5/10/76	Disposition
☐ Prosecution Deferred	12/11/75 Waived ☐	1st Plea: ☒ Not Guilty ☐ Nolo ☐ Guilty	Voir Dire ☐	☐ Convicted ☐ Acquitted ☐ Dismissed ☐ Nolled/Discontinued*
	Superseding ☐ Indict/Info ☐	Final Plea: ☐ Not Guilty ☐ Nolo ☐ Guilty	Trial Began ☐ J ☐ N	☐ On All Charges ☐ On Lesser* Offense(s) ☐ WOP; ☐ WP
			Trial Ended	

		DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT		9/3/75	VAC 070
OFFENSE (In Complaint)		Violation of T-18, U.S.C. Sec. 659	

INITIAL APPEARANCE 9/3/75 INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 10/3/75; Date Held ____

☒ Waived ☐ Not Waived ☐ Intervening Indictment

Tape No. INITIAL/No.

OUTCOME: ☐ Dismissed ☐ Held for District GJ BOND ☐ Exonerated ☐ To Transferee District ☒ Held to Answer to U. S. District Court

AT:

Magistrate's Initials ▶

* Show last names and suffix numbers of other defendants on same indictment/information

LEMANSKI-3, BANERMAN-1, CIOFFI-2, MENGRONE-4, MONTEVECCHI-5, SCHNEIDER-6, SCHNITZER-7

DATE	PROCEEDINGS	V. Excludable Delay (a)	(b)	(c)	(d)
12/11/75	Before MISHLER, CH.J.- Indictment filed				
12-18-75	Before WEINSTEIN J - case called - deft & atty present - deft arraigned and enters a plea of not guilty - bail contd. Pre Trial Conference set for Jan. 6, 1976 at 9:30 am.				
1-6-76	Notice of Appearance filed.				
1-6-76	Before WEINSTEIN J - case called - deft & atty present - Pre Trial Conference held and concluded - all defts waive speedy trial rule - trial set for 5-10-76.				
2/20/76	Notice of readiness for trial filed				
4-7-76	Notice of motion filed, ret. 4-13-76, requiring deft to submit handwriting exemplars, etc.				
4-13-76	Before WEINSTEIN J - above motion argued and granted - So Ordered.				
5-10-76	Before WEINSTEIN J - case called - deft not present - all defts waive speedy trial rule - defts application to adjourn trial dated to Sept. 20, 1976 is granted.				
9/16/76	Govts memorandum of law in oppositionto motion to suppress filed.				
9/20/76	Before PRATT,J. - Case called. Deft & Counsel present. Adjd to 9/21/76 at 10:00 a.m.for criminal hearing & commencement of trial.				
9-21-76	Before PRATT, J. - Case called. Deft & counsel present. Adj'd to 9-23-76 at 10 A.M. for suppression hearing.				

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) – "SPEEDY TRIAL ACT".

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE (a)	(b)
9/23/76	Before PRATT, J. - Case called. Deft &Counsel present. Suppression hearing ordered and begun. Hearing contd to 9/24/76 at 10:00 a.m.		
9-24-76	Before Pratt, J - case called - deft & atty present - hearing contd - contd to 9-27-76		
9-27-76	Before Pratt, J - case called - deft & atty present - hearing contd - contd to -9-28-76		
9-28-76	Before Pratt, J - case called - deft & atty present - suppression hearing resumed - Govt rests - deft rests - hearing contd to 9-29-76.		
9-29-76	5 transcripts filed (pgs 1 to 857)		
9/29/76	Before PRATT, J.- Case called. Deft & Counsel present. Suppression hearing resumed. Motion to suppress - motion argued and motion argued and motion granted. Adjd without date for trial.		
10-5-76	Stenographic transcript dated 9-29-76 filed.		
10/26/76	Notice of motion to re open suppression hearing with Govts memo of law in support of motion filed, returnable 11/5/76 at 9:00 a.m.		
11-5-76	Before Pratt, J.- Case Called. Counsel present. Motion to Suppress argued. Motion denied.		
11-11-76	Stenographer's Transcript dated November 5, 1976 filed.		
11-22-76	By Pratt, J - Order filed that the motion to reopen the suppression hearing is denied etc.		
12/1/76	Govts Notice of Appeal filed.		
12/1/76	Docket entries and duplicate of Notice ofAppeal mailed to the Court of Appeals.		
12-7-76	Notice of Ordering of Partial Transcript filed.		

A 9

COURT — CRIMINAL DOCKET

Assigned Trial 0715 Disp./Sentence | 1 Office

U.S. vs. JOSEPH SCHNITZER defendant

Case Filed: Day 12 Mo. 11 Yr. 75 Docket No. 945 Def. 7 No. of Defdnts 7

75-744

MAGR. CASE NO. 75M1505

S. CODE SECTION	OFFENSES	COUNTS
18:659	Did possess goods stolen from an interstate shipment	1
18:371	Did conspire to possess goods stolen from an interstate shipment	1

BAIL OR RELEASE: ☐ Denied ☐ Personal Recog. ☐ Unsecured Bond ☐ Conditional Release. AMT Set (000) $ ____ ☐ 10% Deposit ☐ Surety ☐ Collateral ☐ 3rd Party Custody ☐ PSA. ☐ date ☐ Bail Not Made ☐ Bail Status Changed (See Docket)

U.S. Attorney or Asst: Alvin Schall

Defense: ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ FD ☐ CD

Emanuel Browman
176-60 Union Tnpke
Kew Gardens, NY. 388-2500

ARREST: 9/3/75 U.S. Custody or Began on Above Charges FBI ☐ Prosecution Deferred

INDICTMENT ☒ Information ☐: 12/11/75 ☐ High Risk Defn. & Date Design'd ☐ Waived ☐ Superseding ☐ Indict/Info ☐

ARRAIGNMENT: 12/18/75 — 1st Plea: G — Final Plea: ☐ Not Guilty ☐ Nolo ☐ Guilty

Trial Set For: 5/10/76

TRIAL: ☐ Voir Dire ☐ Trial Began ☐ J ☐ N J ☐ Trial Ended

SENTENCE: Disposition ☐ Convicted ☐ Acquitted ☐ Dismissed ☐ Nolled/Discontinued* ☐ On All Charges ☐ On Lesser* Offense(s) ☐ WOP ☐ WP*

		DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT		9/3/75	VAC 070A

INITIAL APPEARANCE 9/3/75 INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 10/3/75 Date Held ____ ☒ Waived ☐ Not Waived ☐ Intervening Indictment

Tape No. INITIAL/No.

OUTCOME: ☐ Dismissed ☐ Held for District GJ BOND ☐ Exonerated ☐ To Transferee District ☒ Held to Answer to U. S. District Court AT: Magistrate's Initials

OFFENSE (In Complaint): Violation of T-18, U.S.C. Sec. 659

* Show last names and suffix numbers of other defendants on same indictment/information

BANERMAN-1, CIOFFI-2, LEMANSKI-3, MENGRONE-4, MONTEVECCHI-5, SCHNEIDER-6

V. Excludable Delay (a) (b) (c) (d)

DATE	PROCEEDINGS
12/12/75	Before MISHLER, CH.J.- Indictment filed
12-18-75	Notice of Appearance filed.
12-18-75	Before WEINSTEIN J - case called - deft & atty present - deft arraigned and enters a plea of not guilty - bail contd. Pre Trial Conference set for Jan. 6, 1976 at 9:30 am.
1-6-76	Before WEINSTEIN J - case called - Pre Trial conference held and concluded - all defts waive speedy trial fule - trial set for May 10, 1976.
2/20/76	Notice of readiness for trial filed
4-7-76	Notice of motion filed, ret. 4-13-76, for an order requiring deft to submit handwriting exemplars, etc.
5-10-76	Before WEINSTEIN J - case called - deft not present - counsel present - all defts waive speedy trial rule - defts application to adjourn the trial dateto Sept. 20, 1976 is granted.
5-18-76	Notice of Motion filed, ret. 9-20-76, for suppressing evidence, etc.
9/16/76	Govtsmemorandum of law in oppostion to motion to suppress filed.
9/20/76	Before PRATT, J. - Case called. Deft &Counsel present. Adjd to 9/21/76 at 10:00 a.m.for criminal hearing & commencement of trial.

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) – "SPEEDY TRIAL ACT".

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
9/20/76	Before PRATT, J - Case called. Deft not present. Counsel present. The Court rules that the deft is competent to stand trial.				
9-21-76	Before PRATT, J. - Case called. Deft & counsel present. Adj'd to 9-23-76 at 10 A.M. for suppression hearing.				
9/23/76	Before PRATT, J. - Case called. Deft & Counsel present. Suppression hearing ordered and begun. Hearing contd to 9/24/76 at 10:00 a.m.				
9-24-76	Before Pratt, J - case called - deft & atty present - hearing contd - contd to -9-27-76				
9-27-76	Before Pratt, J - case called - deft & atty present - suppression hearing contd - contd to 9-28-76				
9-28-76	Before Pratt, J - case called - suppression hearing contd - Govt rests - deft rests - hearing contd to 9-29-76				
9-29-76	5 transcripts filed (pgs 1 to 857)				
9/29/76	Before PRATT, J.- Case called. Deft &Counsel present. Suppression hearing resumed. Motion to suppress - motion argued and motion granted. Adjd without date for trial.				
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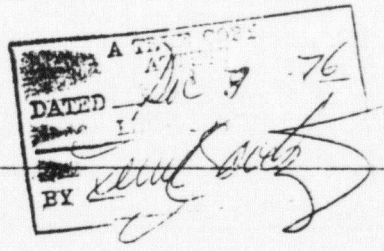
11-22-76	By Pratt, J - Order filed that the motion to reopen the suppression hearing is denied.				
12/1/76	govts Notice of Appeal filed.				
12/1/76	Docket entries and duplicte of Nodice of Appeal mailed to the C of A.				
12-7-76	Notice of Ordering of Partial Transcript filed.				



(a) Interval (per Section II) | (b) Start Date / End Date | (c) Ltr Code | (d) Total Days

RJD:AAS:ljl
F. #753,372

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

HERMAN BANERMAN,
VINCENT F. CIOFFI,
KENNETH R. LEMANSKI,
FRANK P. MENGRONE,
ERNEST L. MONTEVECCHI,
ARNOLD SCHNEIDER, and
JOSEPH SCHNITZER,

Defendants.

- - - - - - - - - - - - - - - - - - - X

Weinstein J

INDICTMENT

Cr. No. 75 CR 944
(T. 18, U.S.C., §659, §2 and §371)

12-12-75

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 2nd day of September, 1975, within the Eastern District of New York, the defendants HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE, ERNEST L. MONTEVECCHI, ARNOLD SCHNEIDER and JOSEPH SCHNITZER did knowingly, wilfully and unlawfully have in their possession a quantity of Stanley tools having a value in excess of One Hundred Dollars ($100.00), which goods had been stolen from a tractor-trailer truck while moving as, and constituting, part of an interstate shipment of freight from Connecticut to Illinois, the defendants HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE, ERNEST L. MONTEVECCHI, ARNOLD SCHNEIDER and JOSEPH SCHNITZER knowing the same to have been stolen. (Title 18, United States Code, Sections 659 and 2).

COUNT TWO

On or about the 2nd day of September, 1975, within the Eastern District of New York, the defendants HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE, ERNEST L. MONTEVECCHI, ARNOLD SCHNEIDER and JOSEPH

SCHNITZER did knowingly and wilfully combine, conspire, confederate and agree, together and with each other, to commit an offense against the United States, in violation of Title 18, United States Code, Section 659, by conspiring to knowingly, wilfully and unlawfully possess a quantity of Stanley tools having a value in excess of One Hundred Dollars ($100.00), which goods had been stolen from a tractor-trailer truck while moving as, and constituting, part of an interstate shipment of freight from Connecticut to Illinois, the defendants HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE, ERNEST L. MONTEVECCHI, ARNOLD SCHNEIDER and JOSEPH SCHNITZER knowing the same to have been stolen.

In furtherance of the said unlawful conspiracy, and for the purpose of effecting the objectives thereof, the defendants HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE, ERNEST L. MONTEVECCHI, ARNOLD SCHNEIDER and JOSEPH SCHNITZER committed the following:

OVERT ACTS

On or about the 2nd day of September, 1975, within the Eastern District of New York, the defendants HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE, ERNEST L. MONTEVECCHI, ARNOLD SCHNEIDER and JOSEPH SCHNITZER each went to the premises located at 226 39th Street in Brooklyn, New York. (Title 18, United States Code, Section 371).

A TRUE BILL.

_____
FOREMAN

_____
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, : 75 CR 945

-against- :

KENNETH R. LEMANSKI, et al., : NOTICE OF MOTION

Defendants. :

- -x

S I R:

PLEASE TAKE NOTICE, that upon the accompanying affidavit of KENNETH J. ARONSON, ESQ., sworn to the 19th day of January, 1976, the indictment and all proceedings heretofore had herein, the undersigned attorneys for defendant KENNETH R. LEMANSKI, will move this Court at a time and date to be set by the Court, for the following orders and for such other and further relief as to the Court may seem just and proper:

I. Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure and the Fourth Amendment to the United States Constitution, for an order as more particularly hereafter described:

(a) Directing an evidentiary hearing prior to trial to determine various issues with respect to the legality of the search and seizure of property from the defendant, LEMANSKI, herein; and

(b) Suppression of the use of the property as evidence in the event that said hearing should disclose that the same was

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obtained illegally.

II. For an order as more particularly hereafter described:

a. Directing an evidentiary hearing prior to trial to determine whether the statements, admissions, and/or confessions of defendant LEMANSKI were made voluntarily after proper advice of his rights as mandated by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436; and

b. Suppression of the use of the statements, admissions and/or confessions as evidence in the event that said hearing should disclose that said statements, admissions and/or confession of defendant LEMANSKI were made involuntarily.

Dated: Brooklyn, N.Y., January 19, 1976.

Yours, etc.,

HOCHHEISER & COHEN
Attorneys for Defendant,
LEMANSKI
16 Court Street
Brooklyn, N.Y. 11241
875-4268

TO: HON. JACK B. WEINSTEIN
Att: TONY SCHALL, ESQ.

HON. DAVID TRAGER
U.S. Attorney
225 Cadman Plaza East
Brooklyn, N.Y. 11201

V OFFICES
OF
CHHEISER
&
COHEN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,	:	75 CR 945
-against-	:	AFFIDAVIT IN SUPPORT OF DEFENDANT KENNETH R. LEMANSKI'S MOTIONS.
KENNETH R. LEMANSKI, et al.,	:	
Defendants.	:	

- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

KENNETH J. ARONSON, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of HOCHHEISER & COHEN, the attorneys for the defendant KENNETH R. LEMANSKI, and make this affidavit in support of various preliminary motions on behalf of said defendant, as more particularly appear in the annexed Notice of Motion.

2. Based upon information and belief from conversations with the defendant, LEMANSKI, and from a reading of the indictment and the file of defense counsel, on or about the 2nd day of September, 1975, defendant LEMANSKI and other persons were lawfully in the premises located at 226 39th Street, Brooklyn, New York; without an arrest warrant, a search warrant, or probable cause to believe that the defendant or others present were engaged in unlawful activity, about ten FBI agents forceably entered the premises, arrested the occupants, and

LAW OFFICES OF HOCHHEISER & COHEN

thoroughly searched the premises. The defendant and other occupants did not consent to this search.

As a result of this search, a quantity of Stanley tools and other physical evidence were seized. Based upon information and belief from reading the indictment, this physical evidence will be used against the defendant at trial.

It is respectfully submitted that this warrantless seizure was unlawful and that it is up to the United States Government to establish otherwise. (See Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

3. Based upon information and belief from conversations with the defendant and representations of Mr. Tony Schall, the Assistant U.S. Attorney prosecuting this case, defendant LAMANSKI made statements to FBI agents after his arrest and signed a piece of paper, the exact contents of which are unknown to defense counsel or the defendant. These statements and writing may well be offered into evidence at trial against the defendant. The defendant denies voluntarily making any such statement after proper advice of his rights.

WHEREFORE, defendant KENNETH R. LEMANSKI respectfully requests that his motions be granted in their entirety.

LAW OFFICES
OF
CHHEISER
&
COHEN

/s/ Kenneth J. Aronson
KENNETH J. ARONSON

Sworn to before me this 19th
day of January, 1976.

LAWRENCE R. COHEN
Notary Public, State of New York
No. 24-0036500
Qualified in Kings County
Commission Expires March 30, 1977

/s/ Lawrence R. Cohen
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

ERNEST L. MONTEVECCHI, et. al.,

Defendants.

----------x

NOTICE OF MOTION
75 CR 945

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of GUSTAVE H. NEWMAN, attorney for the defendant ERNEST L. MONTEVECCHI, duly sworn to on the 23rd day of April, 1976, and the annexed memorandum of law, a motion will be made before the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York at 9:30 a.m. on April 1976 at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for an order suppressing from use at trial all evidence seized from the NO NAME TRANSPORTATION COMPANY, at 226 39th Street, Brooklyn, New York, by agents of the Federal Bureau of Investigation, and for such other and further relief as this Court deems just and proper.

DATED: NEW YORK, NEW YORK
April 23, 1976

Yours, etc.,

GUSTAVE H. NEWMAN
Attorney for Defendant MONTEVECCHI
522 Fifth Avenue
New York, New York 10036
(212) 682-4066

TO: HON. DAVID TRAGER
United States Attorney
Eastern District of New York
ATTENTION: ALVIN A. SCHALL, A.U.S.A.

A 18

Carl D. Bornstein, Esquire
485 Madison Avenue
New York, New York

Aaron Schacher, Esquire
32 Court Street
Brooklyn, New York

Lawrence Hochheiser, Esquire
16 Court Street
Brooklyn, New York

Frederick Abrams, Esquire
250 Broadway
New York, New York

Jacob Evseroff, Esquire
186 Joralemon Street
Brooklyn, New York

Emanuel Growman
176-60 Union Turnpike
Flushing, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

ERNEST L. MONTEVECCHI, et. al.,

Defendants.

AFFIDAVIT

----------x

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

GUSTAVE H. NEWMAN, being duly sworn on oath, deposes and says:

I am the attorney for ERNEST L. MONTEVECCHI, one of seven defendants charged in indictment number 75 CR 945 by a Grand Jury sitting in the Eastern District of New York with possession of property stolen from an interstate shipment (18 U.S.C. 659 and 2) and conspiracy to possess same (18 U.S.C. 371). As such, I am fully familiar with the facts and circumstances surrounding this case.

This motion is made to suppress the Government's use at trial of a quantity of "STANLEY" brand tools seized by agents of the Federal Bureau of Investigation on September 2, 1975 in conjunction with a warrantless arrest of the defendants at their place of business, the "NO NAME TRANSPORTATION COMPANY" at 226 39th Street, Brooklyn, New York.

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FACTUAL BACKGROUND

At about 5:00 p.m. on September 2, 1975, agents of the Federal Bureau of Investigation entered the business premises of the "NO NAME TRANSPORTATION COMPANY" at 226 39th Street, Brooklyn, New York, without benefit of either an arrest warrant or search warrant and placed the defendants under arrest predicated upon the latter's possession of stolen "STANLEY" brand tools.

The premises in question consist of a large commercial garage, at street level, entrance to which may be made either through the garage door or via a standard side entrance door. This street level garage facility is the basic work area utilized by the defendants in conjunction with their surface transportation company. As such, the packing and unpacking, inventorying of goods, and loading operations occur in this closed to the public work area.

In addition to this downstairs work area, the "NO NAME TRANSPORTATION COMPANY" maintains its offices directly upstairs from the combination garage work area. It is in this portion of the facility that the records and papers of the transportation company are prepared, filed and stored.

The upstairs office is reachable from the garage by climbing a staircase which leads from the garage. It was in the upstairs office that defendants FRANK P. MENGRONE and ERNEST L. MONTEVECCHI were taken into federal custody.

THE ARREST

Pursuant to an oral contract with the "L & R TRUCKING COMPANY", the "NO NAME TRANSPORTATION COMPANY" was hired to unpack an L & R truck, conduct an inventory of the truck's contents of tools, and re-pack the shipment on an L & R truck which was to arrive on September 2, 1975.

At about 1:45 p.m. on that date, defendant MONTEVECCHI arrived at 226 39th Street and ascended to the upstairs office. Later, at about 2:05 p.m., he pulled a truck out of the garage into the street and then backed it into the garage.

Later that afternoon, at about 5:00 p.m., defendant JOSEPH SCHNITZER and another individual exited the garage and carried two or three cartons to SCHNITZER'S automobile which was parked nearby -- no more than a block and a half away. SCHNITZER then returned to the premises.

Upon information and belief, shortly thereafter, the defendant ARNOLD SCHNEIDER pulled his automobile up to the front of the premises, and while in the process of loading the trunk of his car with some boxes of the "STANLEY" tools was placed under arrest by the F.B.I.

No arrest or search warrant was displayed, nor, upon information and belief, did the agents possess any such process. Immediately thereafter, some half dozen F.B.I. agents entered the premises and placed all of the defendants, save MONTEVECCHI and MENGRONE, under arrest.

Once the arrest was announced, and the agents were inside the downstairs garage area, they roamed indiscriminately throughout the premises seizing custody of boxes of "STANLEY" tools, as well as other items of tangible evidence.

The agents were not, however, content to remain in the downstairs work area of the premises. Rather, they proceeded up the private staircase which connects the downstairs work area with the upstairs office. Upon entering the office with guns drawn, the agents encountered defendants MENGRONE and MONTEVECCHI engaged in the proper pursuit of their business. The defendant MONTEVECCHI was actually on the telephone at the time the agents entered the office.

Subsequent to placing the defendants MENGRONE and MONTEVECCHI under arrest, the agents conducted a general search of the upstairs office seizing inter alia whatever tangible evidence they desired (see: F.B.I. form 302 appended as an exhibit hereto).

THE LAW

It is defendant MONTEVECCHI'S position that the Fourth Amendment requires the Government to seek and utilize a search warrant wherever practicable. We submit, and believe, that the testimony at a suppression hearing will clearly demonstrate that the agents had sufficient time to apply to a Magistrate for a search or arrest warrant. The unilaterial decision to forego advance approval by a neutral and detached Magistrate and instead to proceed without judicial monitoring cannot be countenanced with the warrant requirement. Accordingly, should the Court ultimately find, as we contend, that the warrant

requirement was circumvented, the evidence seized pursuant to the warrantless arrest should be suppressed.

Assuming arguendo that this Court declines to apply the exclusionary rule due to the Government's failure to obtain a warrant, we question whether the agents had probable cause to make the arrests. Since the arrests were made without benefit of warrant, the burden is cast upon the Government to demonstrate that at the instant of each arrest, there was sufficient justification to conclude both that a crime had been committed and that each defendant had committed it.

We contend that the defendants mere presence in possession of or in close proximity to boxes of tools, without much more, does not show that the defendants were at that point in violation of federal law. It must be remembered that it is not merely bare possession of stolen property, but rather knowing possession which must be proven beyond a reasonable doubt. Accordingly, unless the Government can show more, at a hearing, than that at their arrest some of the defendants were near or actually possessed the "STANLEY" tools, probable cause was lacking and the arrests were unlawful. Since the searches were, upon information and belief, conducted incident to the arrests, if the arrests are constitutionally "bad", then so is the search.

Even assuming that the Court should find that the arrests were executed based upon probable cause, we contend that the scope of the incidental search was far too great to conform with constitutionally acceptable standards. To the extent that the items reflected on exhibit were beyond the "grabbable" area

from which the defendants could either obtain a weapon or destroy vital evidence, the agents had no right to seize the evidence. In addition, since the agents' entry into the second floor office was intentionally planned, it can hardly be said that the evidence in question fits within the "plain view" exception to the warrant requirement.

For all of the foregoing reasons, a plenary hearing on defendant's motion to suppress should be held. Should the testimony develop, as suggested in this Affidavit, then the Court should suppress the evidence seized in violation of the defendant's Fourth Amendment rights.

GUSTAVE H. NEWMAN

SWORN TO BEFORE ME this 23rd day of April, 1976.

GWENN AGRESS
Commissioner of Deeds
City of New York No. 1-1397
Certificate Filed in N.Y. County
Commission Expires April 1, 1978

FEDERAL BUREAU OF INVESTIGATION

A 25

Date of transcription 9/10/75

The following items of an evidentiary nature were seized from the upstairs office located at the No Name Transportation Company, 226 38th Street, Brooklyn, New York (NY):

Desk #1.

1. Two Stanley job master axes.
2. Six legal sized sheets or paper with lines and captions for the lines drawn off on it.
3. Two Stanley tool labels.
4. One sportscoat bearing the label Grossman's Clothes Shop.
5. One address book taken from the inside pocket of the sportscoat.
6. One piece of yellow paper with directions to a location in Connecticut written on it.

Desk #2.

1. One Stanley tool catalog.
2. One Stanley tool dealer's price sheet (yellow in color).
3. One blue Stanley tools net price listing number H175DS.
4. One sheet of white paper with the following notations: 52-222
   52-416
   54-316.
5. Two legal sized sheets of paper with the number of cartons, stock number, description, and amount in carton written on it.
6. One calculator tape with numbers printed on the tape.
7. One letter from Beneficial Life Insurance Company.
8. One piece of white paper with calculations written on it.

Interviewed on 9/2/75 at 8 New York, New York File # NY 15-63833

SAS THOMAS L. ARMSTRONG; WALTER F.J. QUIGLEY; CHARLES K. BOLING and LEWIS G. HINES, III/rmb

by _____ Date dictated 9/8/75

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

BEST COPY AVAILABLE

Desk #3.

1. Four photostated sheets containing an inventory of hardware items (legal sized white in color).
2. Four eight by ten white sheets of paper with an inventory of hardware items listed.
3. Three sheets of accounting type paper reflecting an inventory of hardware items.
4. One Rolodex telephone listing.

The following items were located on the floor in the office of No Name Transportation Company:

Five Stanley tool labels.

The following items were located in the trash can in the office of the No Name Transportation Company:

Four Stanley labels.

Located at the end of the sofa, adjacent to the copying machine, were the following items:

Two cartons containing Stanley tools.

Located on a chair adjacent to the sofa were the following items:

Two cartons containing Stanley tools.

Located on the end of the sofa was a piece of cardboard with a listing of drug type items including Haley's M-O, Phillip's Milk of Magnesia, Campho Pheneque.

The above items were seized as evidence.

FD-302 (REV. 11-27-70)

FEDERAL BUREAU OF INVESTIGATION

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Date of transcription 9/5/75

The following items were removed from the trunk of a blue, four door, Oldsmobile 98, bearing Pennsylvania license, 48L 211:

One box of Stanley saws, model number BSW30
One box, six pairs of Stanley, model LS42A, lapping shears
One box, Stanley, model number 975-5, splitting wedges
One Stanley claw hammer
One Stanley ax, model 59-130
One Stanley scraper
One pair of Stanley grass cutting shears
One black brief case, containing papers

Interviewed on 9/3/75 at New York, New York File # NY 15-68083

by SA LESTER L. HAY/dam 27 Date dictated 9/4/75

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

ERNEST L. MONTEVECCHI, et. al.,

Defendants.

----------x

DEFENDANT MONTEVECCHI'S
MEMORANDUM OF LAW

Preliminary Statement

ERNEST L. MONTEVECCHI moves this Court by a motion dated April 23, 1976 for an order suppressing from use at trial the seizure of a quantity of "STANLEY" tools and related documents and papers seized by agents of the Federal Bureau of Investigation on September 2, 1975 incidental to their entry into commercial premises at 226 39th Street, Brooklyn, New York and warrantless arrest of the defendant MONTEVECCHI.

The facts and circumstances in support of the motion are set forth in the accompanying Affidavit of GUSTAVE H. NEWMAN, ESQUIRE dated April 23, 1976.

POINT I

DEFENDANT MONTEVECCHI HAS STANDING TO MOVE TO SUPPRESS EVIDENCE.

Under recognized concepts of standing (see: Brown v. U.S., 411 U.S. 223 [1973]; U.S. v. Tortorello, ___F.2d___ [2 Cir. 4/1/76 slip opn. 2879-2886]), a defendant possesses a cognizable interest sufficient to warrant the filing of a motion to suppress evidence if:

a. he is on the premises at the time a contested search and seizure is conducted; or

b. he possesses a proprietary interest in the premises which are the subject of the Fourth Amendment invasion; or

c. he is charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

Whether considered in the conjunctive or disjunctive, defendant MONTEVECCHI clearly has standing to champion a motion to suppress the "STANLEY" tools, and related books and records which were seized by the federal agents incidental to the defendant's arrest.

Situated as he was in the upstairs office when arrested, MONTEVECCHI was but a stairway away from the bulk

of the "STANLEY" tools which were seized and which we believe will be offered into evidence by the Government. Clearly, he was "on the premises" within the meaning of the phrase and, hence, has standing to move to suppress both the evidence seized from the office as well as the tools seized from the garage.

Secondly, as the President of "NO NAME TRANSPORTATION COMPANY, INC.", MONTEVECCHI clearly had a proprietary interest in the building at 226 39th Street, Brooklyn, New York, sufficient to confer standing upon him for both the downstairs garage and the upstairs office.

Lastly, MONTEVECCHI stands charged with a possessory offense -- the gravaman of which is his possession at the time the seizure was executed. Clearly, MONTEVECCHI'S possession on September 2, 1975, the date charged in the indictment, does confer standing upon him (see: People v. Gonzalez, 31 N.Y.2d 787, 339 N.Y.S.2d 112, 113 [1972]; Jones v. U.S., 362 U.S. 257; but cf. Brown v. U.S., 411 U.S. 223 [1973] wherein one Knuckles was found to lack standing to maintain a motion to suppress because the indictment filed against Knuckles charges possession on the day before the illegal search of Knuckles' store. In the case at bar, the date of possession and the date of the seizure are the same). Accordingly, the Court should find that defendant

MONTEVECCHI possesses the requisite standing to move to suppress all of the evidence seized by the Government on September 2, 1975 and which it intends to offer as evidence in chief against the defendants.

POINT II

THE AGENTS' ARREST OF DEFENDANT MONTEVECCHI WAS NOT BASED ON A SHOWING OF PROBABLE CAUSE. ACCORDINGLY, ALL EVIDENCE SEIZED INCIDENT TO HIS ARREST MUST BE SUPPRESSED.

Since the warrantless seizure of the "STANLEY" tools and related tangible evidence was predicated upon the incidental nature of the warrantless arrest, the legal vitality for the seizure is wholly dependent upon the Government's ability to convince the hearing court that the arrest was proper. Clearly, if the arrest was improper then the search and seizure of the tools and records is the unlawful fruit of a "bad" arrest.

One begins any assessment of the propriety of an arrest by seeking to ascertain whether it was executed under circumstances where the facts and circumstances within the arresting officers' knowledge is based upon sufficiently trustworthy information to warrant a man of reasonable caution to conclude that an offense has been or is being committed. (Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 1630 [1963]; Brinegar v. U.S., 338 U.S. 160, 175-176 [1949]; Beck v. Ohio, 379 U.S. 89, 91 [1964]). Furthermore, the assessment of probable cause is made upon the basis of the collective knowledge of the police rather than solely upon the knowledge possessed by the arresting officer (U.S. ex rel.

LaBelle v. LaVallee, 517 F.2d 750, 753 [2 Cir. 1975] cert. den. ___U.S.___, 96 S.Ct. 803 [1976]).

Even when the total knowledge of all of the agents who placed 226 39th Street under surveillance on September 2, 1975 is so-pooled, it still, we submit, falls far short of demonstrating that MONTEVECCHI was a possessor or conspirator of possessors of stolen tools. We believe that the testimony at the hearing held pursuant to our motion to suppress evidence will demonstrate that the only observations which the agents made in this case are of certain individuals carrying boxes from the subject premises out to a nearby automobile. Clearly, the mere carrying of boxes, even if the boxes were impregnated with "STANLEY" markings which were visible to the agents, does not give rise to a showing of probable cause.

While we believe that the carrying out of the boxes was an openly conducted operation, said behavior was certainly nothing of an equivocal or suspicious nature (see: People v. Davis, 36 N.Y.2d 280, 282, 367 N.Y.S.2d 256, 257 [1975]). Thus, unless the agents were in possession of pre-seizure hearsay evidence of a credible nature which suggested both that stolen tools were present at the "NO NAME TRANSPORTATION COMPANY" and that the defendants knew or should have known that the tools were part of a shipment stolen while moving in interstate commerce (see: Draper v. U.S., 358 U.S.

307, 79 S.Ct. 329 [1959]), then the observations on September 2, 1975 should be found to be insufficient to support the defendants warrantless arrest.

POINT III

EVIDENCE SEIZED FROM BEYOND THE DEFENDANT'S GRABBABLE REACH IS UNCONSTITUTIONALLY OBTAINED AND SHOULD BE SUPPRESSED.

In deciding Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 [1969], the Supreme Court held that the scope of a warrantless search incident to a lawful arrest may not exceed a full blown search of the defendant's person, and the area from which he might reach to grab a weapon or evidentiary items (see also: Cupp v. Murphy, 412 U.S. 291, 295-296, 93 S.Ct. 2000, 2003-2004 [1973]; U.S. v. Robinson, 414 U.S. 218, 94 S.Ct. 467 [1973]; U.S. v. Vilhotti, 323 F.Supp. 425, 430 [S.D.N.Y. 1971] mod. 452 F.2d 1186 [2 Cir.] cert. den. 406 U.S. 947; U.S. v. Rodriguez, ___F.2d ___ [2 Cir. 1976, slip opn. 2585, 2593-2594]; People v. Ernest "E", 38 A.D.2d 394, 330 N.Y.S.2d 3, 8 [2 Dept. 1972] appeal dism'd 30 N.Y.2d 884 [1972]).

It is patently clear that the federal agents who effected the arrests in the case at bar seized the defendants' property by searching well beyond the area from which a weapon could be obtained and evidence secreted or destroyed. The agents, some half dozen in number, clearly had the defendants in custody and had nothing to fear by way of the defendants attempts to obtain weapons or destroy evidence.

This is especially true in the case of defendants MENGRONE and MONTEVECCHI who were taken into custody in the upstairs office.

No attempt was made either by MENGRONE or MONTEVECCHI to evade arrest or secret evidence. Once these two defendants were taken into custody and were clearly neutralized from the viewpoint of weapons and evidence, the agents' right to conduct a warrantless search throughout the second floor office was at an end. As Judge Friendly noted in U.S. v. Rodriguez (supra), slip opn. 2593-2594:

> "[t]he other agents were required to do as best they could to maintain custody of the aliens lawfully arrested and surveillance of the house while a search warrant was being obtained."

The agents in the case at bar were under a similar obligation once the premises were secured and the defendants arrested to proceed to a Magistrate and attempt to obtain a warrant prior to resuming the search. The fact is, and we believe that the testimony at the hearing will confirm, that these agents were "warrant shy" from the beginning. Rather than attempting to obtain an arrest warrant, the agents acted unilaterally in rejecting judicial supervision and kept to themselves the discretionary determination whether probable cause was present. Similarly, during the

post-arrest phase, the agents likewise chose to proceed as they felt, without judicial supervision, in an attempt to obtain evidence to which they believed they were entitled to obtain.

Clearly, the post-arrest searches went beyond proper bounds by exceeding Chimel (supra) standards. As such, the searches were unreasonably conducted and the suppression of all evidence seized beyond the grabbable area of the defendants may not be offered into evidence.

POINT IV

THE WARRANTLESS ARREST OF THE DEFENDANTS SHOULD BE INVALIDATED AND THE EVIDENCE SEIZED INCIDENTAL THERETO SUPPRESSED BECAUSE THE AGENTS HAD SUFFICIENT OPPORTUNITY TO OBTAIN A WARRANT, BUT CHOSE NOT TO DO SO.

Recognizing that searches conducted outside of judicial process, without prior approval by a neutral and detached Magistrate, are presumed unreasonable (Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 2046 [1971]), a still open question in our jurisprudence is whether a warrantless arrest in a non-public place is legally justified if the arresting officers had sufficient time to obtain a warrant (see: U.S. v. Watson, 424 U.S.___, 96 S.Ct. 820, 825 n.6 [1976]).

We respectfully contend that the facts at the suppression hearing will clearly demonstrate that the officers had sufficient opportunity to present the facts and circumstances relied upon by the Government to a Magistrate. To the extent that the agents chose to avoid having to seek pre-arrest approval from a neutral Magistrate, they oiled at their peril. Should the Court conclude that the entry into 226 39th Street was not prompted by exigent circumstances, the demonstration that the agents intentionally evaded the warrant requirement would be complete.

Thus, should the facts confirm that there was sufficient time to obtain a warrant, but the agents chose not to apply for one, even should the arrest be found to have been based upon probable cause, the arrest should still be invalidated (cf. U.S. v. Watson, supra). Only when agents fear the full force and effect of the exclusionary rule will they begin to become warrant conscious. A society which seeks to remain free requires that such a consciousness be raised.

CONCLUSION

THE DEFENDANT'S MOTION TO SUPPRESS SHOULD BE GRANTED AND THE EVIDENCE SEIZED INCIDENTAL TO THE ARREST SUPPRESSED.

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Defendant MONTEVECCHI
522 Fifth Avenue
New York, New York 10036
(212) 682-4066

DATED: NEW YORK, NEW YORK
April 23, 1976

GUSTAVE H. NEWMAN
ROGER BENNET ADLER
Of Counsel

GUSTAVE H. NEWMAN
COUNSELOR AT LAW

ROGER B. ADLER

522 FIFTH AVENUE
NEW YORK, N.Y. 10036

MURRAY HILL 2-4066

April 29th, 1976

Honorable Jack B. Weinstein
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

RE: U.S. v. MONTEVECCHI, et. al.
75 CR 945

Honorable Sir:

By a motion dated April 23, 1976, I had moved to suppress all of the tangible evidence seized in the above-titled action.

It appears from a recent office interview with my client, ERNEST L. MONTEVECCHI, that some of the facts set forth on page 3 of my Affidavit require clarification.

Specifically, paragraph 2 on page 3 should reflect that at 2:05 p.m. the defendant MONTEVECCHI did not pull a truck out of the garage and then back it in. Rather, it appears that Mr. Montevecchi merely walked outside the premises and backed the truck in.

Furthermore, in paragraph 5 on page 3, it should be corrected to reflect that at no time did the defendant ARNOLD SCHNEIDER open the trunk of the vehicle for purposes of loading same with boxes of "STANLEY" tools. While SCHNEIDER did open the trunk, I have been advised it was not for the purpose of loading tools.

I apologize to the Court and to all the counsel for any inconvenience my inaccuracies caused.

Respectfully yours,

GUSTAVE H. NEWMAN

GHN:ga
CC: All Counsel

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

NOTICE OF MOTION

-against-

Ind. No. 75 CR 945

ARNOLD SCHNEIDER, et al.,

Defendants.

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affirmation of JACOB R. EVSEROFF, attorney for the defendant ARNOLD SCHNEIDER, duly sworn to on the 7 day of May, 1976, and upon the motion papers dated April 23, 1976, filed herein by GUSTAVE H. NEWMAN, ESQ., attorney for co-defendant ERNEST MONTEVECCHI, a motion will be made before Hon. Jack B. Weinstein, United States District Judge, for the Eastern District of New York at 9:30 a.m. on May 10, 1976 at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for an order suppressing all evidence seized by agents of the Government from the NO NAME TRANSPORTATION COMPANY, 226 39th Street, Brooklyn, New York and from the person of defendant ARNOLD SCHEIDER, and for such other and further relief as this Court deems just and proper.

Dated: Brooklyn, New York
May 7, 1976

Yours, etc.,

EVSEROFF & SONENSHINE
Attorneys for Defendant
186 Joralemon Street
Brooklyn, New York 11201

TO:
HON. DAVID TRAGER
United States Attorney
Eastern District of New York
Attn: ALVIN A. SCHALL, A.U.S.A.

Carl D. Bernstein, Esq.
Kronen & Bernstein
485 Madison Avenue
New York, New York 10022

Aaron Schacher, Esq.
32 Court Street
Brooklyn, New York 11201

Lawrence Hochheiser, Esq.
Hochheiser & Cohen
16 Court Street
Brooklyn, New York
Suite 1804

Frederick Abrams, Esq.
250 Broadway
New York, New York

Gustave H. Newman, Esq.
522 Fifth Avenue
New York, New York 10039

Emanuel Growman, Esq.
176-60 Union Turnpike
Flushing, New York 11366

A 44

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ARNOLD SCHNEIDER, et al.,

Defendants.

STATE OF NEW YORK)
:ss.:
COUNTY OF KINGS)

JACOB R. EVSEROFF, being duly sworn, deposes and says:

I am the attorney for ARNOLD SCHNEIDER, one of seven defendants charged in indictment number 75 CR 945 by a Grand Jury of the Eastern District of New York with possession of property stolen from an interstate shipment (18 U.S.C. 659 and 2) and conspiracy to possess same (18 U.S.C. 371). As such, I am fully familiar with the facts and circumstances surrounding this case.

This motion is made to suppress the Government's use at trial of all evidence, including a quantity of "STANLEY" brand tools and other property seized by agents of the FBI on or about September 2, 1975 in conjunction with a warrantless search and arrest of defendants at the premises of the NO NAME TRANSPORTATION COMPANY, 226 39th Street, Brooklyn, New York.

I have read the motion papers dated April 23, 1976, filed by GUSTAVE H. NEWMAN, ESQ., attorney for defendant ERNEST MONTEVECCHI,

in conjunction with a motion to suppress made on behalf of defendant MONTEVECCHI and hereby join in said motion on behalf of my client.

A reading of the affidavit of Special Agent THOMAS L. ARMSTRONG sworn to on September 3, 1975 before the United States Magistrate in connection with the instant case, a copy of which is annexed hereto, reveals that the only predicate for the warrantless search and arrest of the defendants and premises herein were some observations of equivocal, innocent activity, to wit, vehicles pulling in and out of a warehouse. Such ovservation, it is submitted, do not amount to the requisite probable cause to arrest and for search. It is further submitted that if probable cause did exist herein, the instant search was nevertheless invalid without a warrant.

WHEREFORE, your deponent requests that a plenary hearing be held on the instant motion and that the property seized herein be suppressed.

Sworn to before me this
7th day of May, 1976

Marshall Blumenfeld

MARSHALL BLUMENFELD
Notary Public, State of New York
No. 41-0330070 Qual. in Queens Co.
~~Certificate Filed in New York County~~
Term Expires March 30, 1977

JACOB R. EVSEROFF

A 46

[illegible]
No. 73-3,372

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

HERMAN BANERMAN,
FRANK P. MENGRONE,
KENNETH LEMANSKI,
JOSEPH SCHNITZER,
ERNEST MONTEVECCHI,
VINCENT CIOFFI and
ARNOLD SCHNEIDER,

Defendants.

U.S.C. Title 18
Section 659

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EASTERN DISTRICT OF NEW YORK, SS:

THOMAS L. ARMSTRONG, being duly sworn, says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Upon information and belief, on or about the 2nd day of September 1975, within the Eastern District of New York, the defendants HERMAN BANERMAN, FRANK P. MENGRONE, KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI, VINCENT CIOFFI and ARNOLD SCHNEIDER knowingly, wilfully and unlawfully had in their possession, knowing the same to have been stolen, a quantity of Stanley tools, of a value in excess of One Hundred Dollars ($100.00), which tools were stolen at Bridgeport, Connecticut on or about August 27, 1975, while moving as and constituting a part of an interstate shipment of freight from New Britain, Connecticut to Melrose Park, Illinois.

The source of your deponent's information and

the grounds for his belief are:

1. Investigation by your deponent and other Special Agents of the Federal Bureau of Investigation which revealed that a tractor and trailer containing an interstate shipment of Stanley tools with an approximate value of $115,000 had been stolen from Gilbrith Truck Leasing 62 Waterview Avenue, Bridgeport, Connecticut on or about August 27, 1975, while on route from New Britain, Connecticut, to Melrose Park, Illinois.

2. Observation between approximately 2:15 p.m. and 5:50 p.m. on September 2, 1975 by your deponent and other Special Agents of the Federal Bureau of Investigation of the defendants HERMAN BANERMAN, FRANK P. MENGRONE, KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI, VINCENT CIOFFI and ARNOLD SCHNEIDER engaged in conversation with each other and of the defendants KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI and ARNOLD SCHNEIDER actively engaged in the parking and repositioning of vehicles in and in front of a warehouse in the name of No-Name Transportation Inc., located at 226 39th Street, Brooklyn, New York while the defendants FRANK P. MENGRONE, VINCENT CIOFFI, and HERMAN BANERMAN looked on and engaged in conversation with each other and with the other defendants.

3. Observation on September 2, 1975, by Special Agents of the Federal Bureau of Investigation of the defendant JOSEPH SCHNITZER loading cartons containing Stanley tools into an automobile parked in front of said No-Name Transportation premises.

Brooklyn, New York.

4. Investigation by Special Agents of the Federal Bureau of Investigation which revealed that the aforesaid cartons were part of the above-described stolen shipment and that the aforesaid automobile was registered to the defendant JOSEPH SCHNITZER.

5. Observation by Special Agents of the Federal Bureau of Investigation of the defendant ARNOLD SCHNEIDER beginning to exit and then fleeing back into the aforesaid premises with one (1) carton containing Stanley tools in his possession.

6. Investigation by Special Agents of the Federal Bureau of Investigation which revealed that the said carton was part of the above-described stolen shipment.

7. Observation by Special Agents of the Federal Bureau of Investigation of numerous cartons containing Stanley tools on the ground floor of the said premises and on two motor trucks located therein.

8. Investigation by your deponent and other Special Agents of the Federal Bureau of Investigation that the said cartons was also a part of the above-described stolen shipment.

9. Observation by your deponent of the defendants HERMAN BANDMAN, FRANK P. MENGRONE, KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI and VINCENT CIOFFI in an office located on the second floor of the

above-described premises with approximately four (4) cartons containing Stanley tools, labels from Stanely tools cartons, inventory sheets relating to the aforementioned stolen shipment and other written and printed materials relating to Stanley tools in plain view.

10. Investigation by your deponent and other Special Agents of the Federal Bureau of Investigation that the said cartons were also a part of the above-described stolen shipment.

WHEREFORE, your deponent respectfully prays that the above-named defendants HERMAN BANERMAN, FRANK P. MENGRONE, KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI, VINCENT CIOFFI and ARNOLD SCHNEIDER be dealt with according to law.

Sworn to before me this
3rd day of September 1975.

United States Magistrate
Eastern District of New York

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -against- JOSEPH SCHNITZER, et al., Defendants	NOTICE OF MOTION Ind. No. 75 CR 945

S I R S :

PLEASE TAKE NOTICE that upon the annexed Affidavit of EMANUEL GROWMAN, attorney for the defendant JOSEPH SCHNITZER, duly sworn to on the 11th day of May, 1976, and upon the motion papers dated April 23, 1976, filed herein by GUSTAVE H. NEWMAN, ESQ., attorney for co-defendant ERNEST MONTEVECCHI, a motion will be made before Hon. Jack B. Weinstein, United States District Judge for the Eastern District of New York at 9:30 A.M. on the 20th day of Sept., 1976 at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for an order suppressing all evidence seized by agents of the Government from the NO NAME TRANSPORTATION COMPANY, 220 39th Street, Brooklyn, New York, and from the person of defendant JOSEPH SCHNITZER, and for such other and further relief as this Court deems just and proper.

Dated: May 13 1976
Queens, New York

Yours, etc.,

EMANUEL GROWMAN
Attorney for Defendant
176-60 Union Turnpike
Flushing, New York 11366

TO:

HON. DAVID TRAGER
United States Attorney
Eastern District of New York
Att: ALVIN A. SCHALL, A.U.S.A.

Carl D. Bernstein, Esq.
Kronen & Bernstein
485 Madison Avenue
New York, New York 10022

Aaron Schacher, Esq.
32 Court Street
Brooklyn, New York 11201

Lawrence Hochheiser, Esq.
Hochheiser & Cohen
16 Court Street
Brooklyn, New York
Suite 1804

Frederick Abrams, Esq.
299 Broadway
New York, New York

Gustave H. Newman, Esq.
250 Fifth Avenue
New York, New York 10019

Jacob R. Evseroff, Esq.
Evseroff & Sonenshine
186 Joralemon Street
Brooklyn, New York 11201

A 52

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -against- JOSEPH SCHNITZER, et al., Defendants.	AFFIDAVIT

STATE OF NEW YORK)
) s.s.
COUNTY OF QUEENS)

EMANUEL GROSSMAN, being duly sworn, deposes and says:

I am the attorney for JOSEPH SCHNITZER, one of the defendants herein who has been charged with POSSESSION OF STOLEN PROPERTY FROM INTERSTATE SHIPMENT and CONSPIRACY TO POSSESS SAME. As such, I am fully familiar with the facts and circumstances surrounding this case.

This motion is made to suppress the Government's use at trial of all evidence, including a quantity of "STANLEY" brand tools and other property seized by agents of the FBI on or about September 2, 1975 in conjunction with a warrantless search and arrest of defendants at the premises of the NO NAME TRANSPORTATION COMPANY, 320 39th Street, Brooklyn, New York.

I have read the motion papers dated April 23, 1976 filed by GUSTAVE H. NEWMAN, ESQ., attorney for defendant ERNEST MONTEVECCHI, in conjunction with a motion to suppress made on behalf of defendant MONTEVECCHI and hereby join in said motion on behalf of my client.

A reading of the Affidavit of Special Agent THOMAS L. ARMSTRONG sworn to on September 5, 1975 before the United States Magistrate in connection with the instant case, a copy of which is annexed hereto, reveals insufficient facts to have created probable cause upon which to have made a warrantless search and arrest of the defendants. The observations allegedly made by the Agent were acts constituting innocent activity, and not of a suspicious nature. In addition thereto upon information and belief, Agent ARMSTRONG swore to a fact which was untrue. In Paragraph 4 of his Affidavit he stated that certain cartons were placed in an automobile registered to the defendant JOSEPH SCHNITZER. Upon information and belief no vehicle at the premises was registered at any time in the name of JOSEPH SCHNITZER, and the willingness on the part of the Agent to swear to such fact without taking the time to determine the truth of the facts, makes the entire Affidavit suspect.

WHEREFORE, your deponent requests that a plenary hearing be held on the instant motion, and that the property seized herein be suppressed.

Sworn to before me this
11th day of May, 1976

/S/
EMANUEL GROWMAN

A Certified
P. #753,372 A 54

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA U.S.C. Title 18
Section 659

-against-

HEIMAN BANERMAN,
FRANK P. MENGRONE,
KENNETH LEMANSKI,
JOSEPH SCHNITZER,
ERNEST MONTEVECCHI
VINCENT CIOFFI and
ARNOLD SCHNEIDER,

Defendants.

- - - - - - - - - - - - - - - - - - - X

EASTERN DISTRICT OF NEW YORK, SS:

THOMAS L. ARMSTRONG, being duly sworn, says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Upon information and belief, on or about the 2nd day of September 1975, within the Eastern District of New York, the defendants HEIMAN BANERMAN, FRANK P. MENGRONE, KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI, VINCENT CIOFFI and ARNOLD SCHNEIDER knowingly, wilfully and unlawfully had in their possession, knowing the same to have been stolen, a quantity of Stanley tools, of a value in excess of One Hundred Dollars ($100.00), which tools were stolen at Bridgeport, Connecticut on or about August 27, 1975, while moving as and constituting a part of an interstate shipment of freight from New Britian, Connecticut to Melrose Park, Illinois.

The source of your deponent's information and

the grounds for his belief are:

1. Investigation by your deponent and other Special Agents of the Federal Bureau of Investigation which revealed that a tractor and trailer containing an interstate shipment of Stanley tools with an approximate value of $115,000 had been stolen from Gilbrith Truck Leasing 62 Waterview Avenue, Bridgeport, Connecticut on or about August 27, 1975, while on route from New Britain, Connecticut, to Melrose Park, Illinois.

2. Observation between approximately 2:15 p.m. and 5:50 p.m. on September 2, 1975 by your deponent and other Special Agents of the Federal Bureau of Investigation of the defendants HERMAN BANERMAN, FRANK P. MENGRONE, KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI, VINCENT CIOFFI and ARNOLD SCHNEIDER engaged in conversation with each other and of the defendants KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI and ARNOLD SCHNEIDER actively engaged in the parking and repositioning of vehicles in and in front of a warehouse in the name of No-Name Transportation Inc., located at 226 39th Street, Brooklyn, New York while the defendants FRANK P. MENGRONE, VINCENT CIOFFI, and HERMAN BANERMAN looked on and engaged in conversation with each other and with the other defendants.

3. Observation on September 2, 1975, by Special Agents of the Federal Bureau of Investigation of the defendant JOSEPH SCHNITZER loading cartons containing Stanley tools into an automobile parked in front of said No-Name Transportation premises,

A 56

Brooklyn, New York.

4. Investigation by Special Agents of the Federal Bureau of Investigation which revealed that the aforesaid cartons were part of the above-described stolen shipment and that the aforesaid automobile was registered to the defendant JOSEPH SCHNITZER.

5. Observation by Special Agents of the Federal Bureau of Investigation of the defendant ARNOLD SCHNEIDER beginning to exit and then fleeing back into the aforesaid premises with one (1) carton containing Stanley tools in his possession.

6. Investigation by Special Agents of the Federal Bureau of Investigation which revealed that the said carton was part of the above-described stolen shipment.

7. Observation by Special Agents of the Federal Bureau of Investigation of numerous cartons containing Stanley tools on the ground floor of the said premises and on two motor trucks located therein.

8. Investigation by your deponent and other Special Agents of the Federal Bureau of Investigation that the said cartons was also a part of the above-described stolen shipment.

9. Observation by your deponent of the defendants HERMAN BANDMAN, FRANK P. MEUGRONE, KENNETH LOMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI and VINCENT CIOFFI in an office located on the second floor of the

above-described premises with approximately four (4) cartons containing Stanley tools, labels from Stanely tools cartons, inventory sheets relating to the aforementioned stolen shipment and other written and printed materials relating to Stanley tools in plain view.

10. Investigation by your deponent and other Special Agents of the Federal Bureau of Investigation that the said cartons were also a part of the above-described stolen shipment.

WHEREFORE, your deponent respectfully prays that the above-named defendants HERMAN DANERMAN, FRANK P. HENGROME, KENNETH LEWENSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI, VINCENT CIOFFI and ARNOLD SCHNEIDER be dealt with according to law.

Sworn to before me this
3rd day of September 1975.

United States Magistrate
Eastern District of New York

A-53

GOVERNMENT EXHIBIT
75 CR 796
HIS EVD

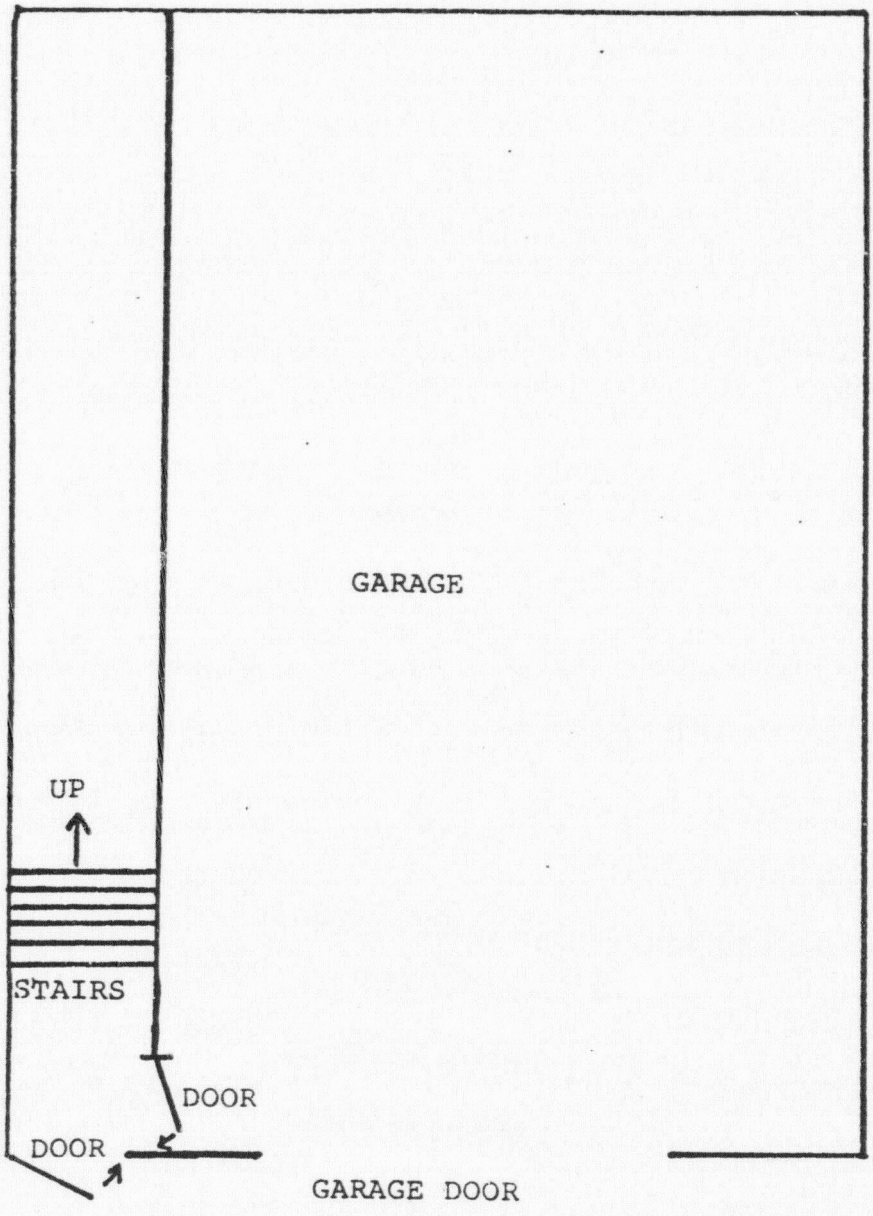
GOVERNMENT
EXHIBIT
25CR945
HISA EVP
NO NAME TRANSPORTATION INC
226 39 ST BKLYN 11232
788-1212
IMPORT EXPORT DOMESTIC TRUCKING
A 59

A 60

GARAGE DIAGRAM

226 39th STREET

BROOKLYN, NEW YORK



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against - 75 CR 945

HERMAN BANERMAN,
VINCENT F. CIOFFI,
KENNETH R. LEMANSKI,
FRANK P. MENGRONE,
ERNEST L. MONTEVECCHI,
ARNOLD SCHNEIDER and
JOSEPH SCHNITZER,

Defendants.

- - - - - - - - - - - - - - - - - - X

GOVERNMENT'S MEMORANDUM OF LAW IN
OPPOSITION TO MOTION TO SUPPRESS

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201.

Alvin A. Schall,
Assistant U.S. Attorney,
(Of Counsel).

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PRELIMINARY STATEMENT

Count One of indictment 75 CR 945 charges defendants Ernest Montevecchi, Herman Banerman, Vincent F. Cioffi, Kenneth R. Lemanski, Frank P. Mongrone, Arnold Schneider and Joseph Schnitzer with unlawful possession, on September 2, 1975, of a quantity of stolen Stanley tools, in violation of Title 18, United States Code, Sections 659 and 2. Count Two of the indictment alleges that on September 2, 1975, defendant Montevecchi and his six co-defendants conspired to possess the stolen goods, in violation of Title 18, United States Code, Section 371.

The stolen tools were recovered by agents of the Federal Bureau of Investigation ("FBI") in the course of a warrantless search of the premises at 226 39th Street in Brooklyn, New York, on September 2, 1975. Defendant Montevecchi has moved to suppress the seized tools as well as other items of evidence recovered at the premises. This memorandum of law is submitted in opposition to defendant Montevecchi's motion.

STATEMENT OF FACTS

It is anticipated that testimony at the suppression hearing will establish the following sequence of events:

On or about August 27, 1975, a tractor-trailer containing a quantity of Stanley tools was stolen from the premises of a truck leasing facility in Bridgeport, Connecticut. At the time of the theft, the tools in the trailer were moving as an interstate shipment from Connecticut to Illinois. The ~~trailer~~ tractor was recovered - empty - by the New York City Police Department on Staten Island on August 28, 1975.

At approximately 2:00 P.M., on September 2, 1975, agents of the FBI, in connection with their investigation in this case, established a surveillance of the premises at 226 39th Street in Brooklyn, New York. At approximately 2:15 P.M. surveilling agents observing the arrival of a green Oldsmobile and an 18 foot straight truck bearing the letters "RVD" (the "RVD" truck) outside the premises. The Oldsmobile was driven by defendant Joseph Schnitzer, the straight truck by defendant Kenneth R. Lemanski. After parking the vehicles they were driving, Schnitzer and Lemanski both entered 226 39th Street. Shortly thereafter, Lemanski drove a maroon Mack tractor from the garage portion of the premises and parked it in front of the RVD truck. Lemanski then reentered 226 39th Street.

A 20 foot straight truck, with a yellow cab and silver box, was then observed to exit the garage, cab first, make a U turn and then pull into the premises, cab first. Shortly thereafter, LeManski and defendant Arnold Schneider were seen to approach the RVD truck and to work together making repairs on it. Lemanski and Schneider then returned to the garage.

At approximately 3:10 P.M. defendant Montevecchi arrived at the garage and entered the premises. Subsequently, Lemanski and Montevecchi were observed together apparently making repairs on the RVD truck. Montevecchi was then observed to enter the RVD truck and back it into the garage at 226 39th Street. Subsequently, the maroon tractor was also moved into the garage.

A few minutes later Joseph Schnitzer exited the garage, reparked his car near the pedestrian entrance to 226 39th Street and then re-entered the premises.

At approximately 5:20 P.M. Schnitzer exited 226 39th Street again, walked to the parked Oldsmobile and then

backed the vehicle to a position directly in front of the open pedestrian door of the garage. Almost simultaneously, a male individual wearing a white tee shirt and blue pants exited the garage carrying two cartons which he placed in Schnitzer's car. While Schnitzer adjusted the cartons, the aforementioned individual returned to the building and brought out two more cartons which were also placed in the car. Schnitzer and this individual then re-entered 226 39th Street; at about 5:25 P.M. Schnitzer's tee-shirted helper exited the garage and departed from the area.

As they conducted their surveillance, the agents knew of the theft of the tools and also of the recovery of the stolen ~~trailer~~ tractor on Staten Island on August 28, 1975. In addition, they were furnished with physical descriptions of the cartons which were in the stolen shipment. They were also informed that certain of the cartons bore bright yellow Stanley labels. Accordingly, it was observed that the cartons being placed in the trunk of the Oldsmobile by defendant Schnitzer and the man assisting him were approximately similar in size and shape to cartons which had been on the stolen trailer.

At about 5:45 P.M. defendant Schneider exited 226 39th Street, entered a gray Cadillac which was parked across the street and moved the car to directly behind Schnitzer's green Oldsmobile. After parking the car, Schneider opened the trunk and entered the pedestrian entrance of the garage. When he reappeared minutes later, Schneider was observed carrying a cartons which fitted the general description of cartons on the stolen shipment.

At this point, a car containing agents drove up to the front of 226 39th Street. Upon seeing the car with the agents in it, Schneider turned around and, still carrying the cartons, ran back into the building. Agent Walter Quigley, who was in the car, observed Schneider with the cartons and ~~recognized the Stanley~~ saw a bright yellow labels from the description he had been given. He pursued Schneider as he ran from the Cadillac. From the doorway on 226 39th Street, as he followed Schneider, Agent Quigley could see, inside the premises, additional cartons with ~~Stanley~~ bright yellow labels. Followed by other agents, Quigley then entered the garage in pursuit of Schneider. Shortly thereafter, defendant

Schneider was arrested by Agent Quigley in the garage portion of the premises with a Stanley carton in his possession. While searching for Schneider and upon his arrest, the pursuing agents observed through the open rear of trucks in the garage area a number of cartons bearing Stanley labels and matching the description of the cartons from the stolen shipment.

Agent Thomas Armstrong, who had been following the progress of the surveillance by radio, arrived inside the garage shortly after defendant Schneider had been placed under arrest. Armstrong was told that Schneider had been arrested and that there were Stanley tools in trucks in the garage. Upon receiving this information, Armstrong climbed the stairs in front of him in order to further secure the building. Upon reaching the top of the stairs, Armstrong headed down a hall in the direction from which voices were coming. At the end of the hall he found himself in an office occuppied by defendants Montevecchi, Banerman, Cioffi, Lemanski, Mengrone and Schnitzer. These defendants were then placed under arrest, and shortly thereafter the agents seized as evidence a number of items which were in plain view in the office.

ARGUMENT

THE SEIZURE OF THE FRUITS OF A CRIME AND EVIDENCE AT 226 39th STREET IN BROOKLYN, NEW YORK, ON SEPTEMBER 2, 1975, WAS REASONABLE AND DID NOT VIOLATE THE FOURTH AMENDMENT TO THE CONSTITUTION.

Defendant Montevecchi has moved to suppress the Stanley tools and other items of evidence seized from the premises at 236 39th Street on September 2, 1975.[1/] He bases his motion on the ground that the seizure was incidental to an arrest for which there was not probable cause. We respectfully submit that defendant's claim is without merit.

It is the Government's position that when defendant Schneider fled into 226 39th Street carrying the Stanley cartons, the agents had probable cause to arrest him. They thus were in legitimate pursuit of Schneider when the stolen goods in the downstairs portion of the premises came into their view. Consequently, these stolen goods were properly seized. In addition, there was clearly probable cause for the arrest of Montevecchi and five of his co-defendants in the upstairs office. This arrest

1/ The Government does not contest the standing of Montevecchi to challenge the validity of the seizure. Brown v. United States, 411 U.S. 223, 227-230 (1973).

properly followed the seizure downstairs. The evidentiary items recovered from the office upstairs were in plain view at the time of the arrest of Montevecchi and five of his co-defendants and were thus properly seized.

The question of whether or not there was probable cause to arrest defendant Schneider must turn on an analysis of the facts known to the agents at the time of the arrest. The test is whether or not those facts "were sufficient to warrant a prudent man in believing that [Schneider] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). It was not necessary, however, that the agents know of facts sufficient to prove guilt at trial or sufficient to negate all possible lawful explanations for Schneider's actions. United States v. Rodriguez, 532 F.2d 834, 838 (2d Cir. 1976).

Here, the FBI knew of the theft of the Stanley shipment on August 27th, and the agents had knowledge of the recovery of the stolen ~~trailer~~ tractor on Staten Island on August 28th. In addition, just a short time before Schneider moved the gray Cadillac to the front of the garage, Schnitzer was seen loading the green Oldsmobile with cartons which had been brought out of 226 39th Street and which matched the description of cartons on the stolen shipment.

Thereafter, when Schneider existed 226 39th Street and walked towards his car, he was observed carrying a box which bore what appeared to be the bright yellow Stanley label, see United States v. Lewis, 362 F.2d 759, 760-761 (2d Cir. 1966), and which also was similar in size and shape to cartons known to have been on the stolen shipment. Then, when the agents approached, Schneider ran back into the building, still carrying the cartons. Based on the knowlege they possessed, what they had observed in the course of the afternoon and their experience, the agents were certainly justified in concluding that Schneider was committing a crime when he fled at their approach. See United States v. Mont, 306 F.2d 412 (2d Cir.), cert. denied, 371 U.S. 935 (1962); United States v. Wabnik, 444 F.2d 203 (2d Cir.), cert. denied, 404 U.S. 851 (1971); United States v. Owens, 475 F.2d 759 (5th Cir. 1973). There was thus probable cause for his arrest.

Since there was probable cause to arrest defendant Schneider, Agent Quigley was in legitimate "hot pursuit" of a fleeing suspect when he approached the pedestrian doorway of 226 39th Street, and it was thus proper for him to enter the premises. Warden v. Hayden, 387 U.S. 294, 298-299 (1967). United States v. Santana, ___U.S.___, 96 S.Ct. 2406, 2409 (1976). From the doorway, and as he followed Schneider into the garage area, more cartons bearing the distinctive yellow Stanley label came into Quigley's view. Agents Hines and

Morrill entered the door behind Quigley. Knowing from the surveillance that there were at least three other individuals (Montevecchi, Schnitzer and Lemanski) in the building, they joined in the pursuit of Schneider in the garage. In the course of searching for Schneider, they also observed cartons with Stanley labels. Upon Schneider's apprehension, additional Stanley cartons were seen in the rear of trucks (including the RVD truck) in the area where Schneider was arrested. The Stanley cartons in the garage were in "plain view" of agents who had a right to be in the place from which they made their observations and who inadvertently came upon the cartons. The stolen goods were properly seized. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). See also United States v. Rothberg, 460 F.2d 223 (2d Cir. 1972)[2/]

Following the arrest of Schneider, Agent Armstrong entered the premises. Upon his entrance, he was told what had just happened downstairs (the arrest of Schneider and the recovery of the Stanley cartons). Having good cause from the surveillance, as did the other agents, to believe that there were at least three other individuals (Montevecchi,

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2/ The motivation for the entry into 226 39th Street was the arrest of defendant Schneider. The inadvertence requirement of Coolidge (403 U.S. at 469) was thus met. See United States v. Montiell, 526 F.2d 1008, 1010 (2d Cir. 1975).

Schnitzer and Lemanski) in the building, Agent Armstrong headed to the upstairs area to search for these individuals and to properly secure the building. United States v. Briddle, 436 F.2d 4, 7-8 (8th Cir. 1970), cert. denied, 401 U.S. 921 (1971); United States v. Miller, 449 F.2d 974, 977 (D.C. Cir. 1970); United States v. Christophe, 470 F.2d 865, 869 (2d Cir. 1972), cert. denied, 411 U.S. 964 (1973). See also Warden v. Hayden, supra at 298-299. Thereafter, based on the afternoon's surveillance and what had just transpired, there was clearly probable cause for Armstrong to arrest defendant Montevecchi and the other individuals he found in the upstairs office. The items in the office were in "plain view" at the time of the arrest and were thus properly seized. 3/

3/ After the arrest of the seven defendants, agents recovered from the trunk of the car which had been driven by defendant Schnitzer several cartons containing Stanley tools. It is the Government's position that defendant Montevecchi does not have standing to contest this seizure. Montevecchi was neither in the car nor had any proprietary interest in it, Brown v. United States, supra, United States v. Pui Kan Lam, 483 F.2d 1202, 1205 n.4 (2d Cir. 1973), and the car was not a place where he could be said to have had a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347 (1967).

Leaving aside, however, any questions of standing, the seizure from the trunk of the car was clearly proper. The keys to the car were surrendered to Agent Donald Dowd by defendant Schnitzer following his lawful arrest, cf. United States v. Rothberg, supra, at 224-225. Moreover, the agents had seen Schnitzer place into the trunk of the car cartons fitting the description of boxes on the stolen shipment. In addition, they now had before them the flight of Schneider and the recovery of the Stanley tools and other evidence from inside 226 39th Street. There was clearly probable cause to search the trunk of the Oldsmobile. Armed with this probable cause, it was not necessary for the agents to obtain a warrant before they searched the trunk. Chambers v. Maroney, 399 U.S. 42, 52 (1970); United States ex rel La Belle v. La Valle, 517 F.2d 750, 755-756 (2d Cir. 1975), cert. denied, ___U.S.___, 96 S.Ct 803 (1976).

Finally, defendant Montevecchi can derive no support from the contention that his arrest was improper because the agents had sufficient time to obtain an arrest warrant but failed to do so. As the evidence will show, there was not sufficient time to obtain an arrest warrant. Probable cause for Montevecchi's arrest only arose with the afternoon's surveillance, the apprehension of Schneider following his flight into 226 39th Street and the seizure of the Stanley tools in the downstairs portion of the premises.[4/]

4/ Moreover, probable cause rather than exigent circumstances is the factor to consider in determining whether or not an arrest is valid. It is not necessary for officers to immediately obtain arrest warrants before they apprehend a suspect. In United States v. Watson, 423 U.S. 411 (1976), the Supreme Court upheld a warrantless public arrest based upon probable cause that a felony was being committed even though the arresting agents had six days in which to obtain a warrant.

CONCLUSION

Defendant Montevecchi's motion should, in all respects, be denied.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201.

Alvin A. Schall,
Assistant U.S. Attorney,
(Of Counsel).*

*The United States Attorney's Office wishes to acknowledge the assistant of Mr. Michael Yoeli and Mr. Lawrence Dugan in the preparation of this memorandum of law. Mr. Yoeli is a third year student at the New York University School of Law. Mr. Dugan is a third year student at the Cornell University School of Law.

THE COURT: Fine. Mr. Schall, do you care to make any argument?

MR. SCHALL: Yes, your Honor. If I might just have a minute to get some photographs.

THE COURT: All right.

MR. SONENSHINE: Excuse me. As of the list of -- rather than interrupting you during the middle, are you going to use Exhibits 15 and 15-A and 15-b? I just want to take a look at them. Those are the ones showing the truck with the driver in it.

This one.

MR. SCHALL: I think I will be. Take a look at them.

MR. SONENSHINE: If you want it, just ask for it.

MR. SCHALL: Yes.

THE COURT: Whenever you are ready.

MR. SCHALL: Fine. Then I will begin.

Just at the outset, to briefly address myself to the question of standing, the Government concedes that all defendants have standing to contest the validity of the search and seizure inside the premises at 226 39th Street. They, Mr. Montevecchi and Mr. Schneider, have a proprietary interest in the premises in view of their position with the No Name Transportation Corporation. And the other defendants were all clearly inside the

premises at the time of the search and seizure.

So clearly there was theexpectation of privacy. And we do not contest their standing.

However, with request to the question on the validity of the search and seizure of the Oldsmobile parked outside, we would take the position that only Mr. Schnitzer, who, according to our information, was the owner of the vehicle, has standing to contest that particular search and seizure.

Turning now to the immediate question involved, I think clearly the -- there are two areas that the Court has to consider. First of all, the Court has to make a factual determination as to what physically happened on the afternoon of September 2nd, 1975. And then upon making that factual determination, the Court has to apply the relevant law andmake its decision.

Addressing myself first to the facts, I submit that the Government has established that what transpired is the -- essentially the version of facts set forth in my memorandum under the statement of facts. Beginning at 2:00 o'clock, 2:15 on the afternoon of the 2nd, there was a surveillance initiated by the FBI. Agent Gonzalez made observations of Mr. Schnitzer, Mr. Lemanski driving up, followed thereafter by their entry into the premises. Shortly thereafter the truck --

I will refer to it as the RVD truck, which is shown in Photograph 1 on Government's Exhibit 16, was moved out of the premises by Mr. Lemanski, followed by the maroon tractor. Then Mr. Schneider and Mr. Lemanski worked on that vehicle. And then the vehicle with -- I think it was described by Agent Gonzalez as the yellow cab and silver box, did a U-turn and went back in, and then a couple of vehicles came and went. Finally there came a point when Mr. Schnitzer emerged from the premises. He moved his vehicle to a position nearer to the door.

I would note, by the way, that at this time the RVD truck and the yellow truck, the maroon tractor, were all inside.

Shortly thereafter, we are now at approximately 5:15 to 5:30. Mr. Schnitzer aided by another individual placed his cartons in the rear of his truck, and then he disappeared inside the premises. And shortly thereafter Agent Gonzalez testified that he saw Mr. Schneider exit the premises, cross over 39th Street and go back to his car, open the truck and enter the premises.

I think it's significant to note that -- unless I am mistaken, but I believe defense counsel takes no issue with the facts of the case until this point. That's my understanding of their position.

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I think it's significant to note also that Agent Gonzalez' testimony up to this point is, I would say, almost completely corroborated by the surveillance photographs which were taken by him from the surveillance vehicle. It is at this point, after this, that the factual distinction arises.

I would submit that based on the testimony of the Government witnesses, in particular Agent Gonzalez, Agent Quigley and Agent Morrill, thatthe facts show that Mr. Schneider emerged from the premises carrying a carton with the label -- with a yellow and black label on it, and that upon seeing the agents approach, Mr. Schneider, who was in a position approximately at the curb, the rear of his Cadillac, upon seeing the agents, in particular, Agent Quigley, ran back into the premises.

Now, just dwelling on that particular point for a moment. I think clearly that the testimony of the agents show that this is in fact the case balanced against the -- this is the version of the facts submitted by Mr. Schneider when he testified yesterday on direct.

I would argue, your Honor, and ultimately the Court has to decide this, that based upon the factors which we traditionally consider in a courtroom in determining the credibility of a witness, the demeanor

of the witness on the stand, the extent to which the witnesses' testimony is corroborated or not corroborated, the consistency of his story in terms of -- quite simply, does it make sense, how the witness responds to the questions.

I am not going to -- I really can't dwell on it anymore. I will simply say, your Honor, that based upon those considerations which are the ones traditionally we use to evaluate a witness' credibility, I would submit that the version of the events which should be credited in this case is the version which has been testified to by Agent Morrill, Agent Gonzalez, and Agent Quigley, and not the version of events which has been testified to by Mr. Schneider.

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MR. SCHALL: Now, going from that point on, I will, of necessity, assume from this point on as I continue, that the Court has resolved that important fact and you will determine in my favor for purposes of the argument.

After seeing Mr. Schneider flee into the premises Mr. Quigley followed him and as he testified, he apprehended him in the vicinity of the rear of vehicle number three, which we know is the one labeled No Name Transportation Co. Finally, following that, his apprehension, Mr. Quigley recovered from Mr. Schneider the box which he had seen run from the street with and he initialled it, and by this time Agent Armstrong had entered and he took a look around and continued to search in the downstairs area and then proceeded to the upstairs area.

With respect to this, I think it is significant to note that the point to be remember is that based upon the transmission and the radio surveillance, the visual surveillance and transmission resulting from that surveillance, it was quite clear that Agent Armstrong was in a position to have reason to believe, and I would say he was in a position to be certain to believe, that there were other individuals in the premises besides Mr. Schneider, who had been arrested by Agent Quigley.

A 82 Following that, Agent Armstrong ascended the stairs and the events which were testified to upstairs took place. Subsequently, Agent Dowd, after the events in question, arrived on the scene.

Mr. Schneider was in custody as were the other defendants and in the manner that Agent Dowd testified yesterday, the trunk of Mr. Schnitzer's vehicle was searched after Agent Dowd obtained the keys to the trunk of the car from Mr. Schnitzer.

Those, I would submit, are the facts of the testimony.

Just one word factually with respect to the testimony of Dr. Perissi. I would submit that Dr. Perissi's testimony in no way substantially aids the position of Mr. Schneider with resepect to his testimony as to what the facts were.

I think the two most significant points to be remarked are that although Dr. Perissi testified that Mr. Schneider had a leg condition he pointed out that in terms of the photograph which I believe was 14, of Mr. Schneider leaving the curb near 39th Street and crossing the street, that his leg could not have been in that position if he had been wearing his brace.

Secondly, Dr. Perissi also testified that although it might have been difficult, certainly Mr. Schneider

could have moved rapidly without any brace on. I think I would say those are the two most significant points in his testimony in terms of judging the credibility of Mr. Schneider.

I think it is also significant to note in judging that credibility that Mr. Schneider stated yesterday that he was not wearing his knee brace at the time of the events.

THE COURT: You say Mr. Schneider said he was not wearing the knee brace?

MR. SCHALL: He was wearing it, I am sorry, thank you for correcting me. I think in judging his credibility I think it is significant to note Dr. Perissi said Mr. Schneider said he could not have been wearing the knee brace and have his leg in that position whereas Mr. Schneider said he was wearing the knee brace.

I would like to leave at this point the facts, clearly that is a question for the Court to decide. But I would submit based upon the traditional guidelines the facts as I have argued orally and in my memorandum of law.

Turning to the law, I would respectfully submit, your Honor, that accepting those facts that the legal issues are not difficult in this case to resolve. The question here is was this search and seizure unreasonable

or was it reasonable.

I submit that the authorities were clearly on the side of our position that this was a reasonable search and seizure. I would submit at this point Agent Quigley appeared on the scene and saw Mr. Schneider run into 226 39th Street and he had probable cause to believe that a crime had been committed or that a crime was being committed in his presence.

As I have stated in my memorandum, the test is whether or not the facts known to the agents were sufficient to warrant a prudent man in believing that in this case Mr. Schneider was committing an offense. As I indicated, it is not necessary for them to have enough proof to present to a jury nor a conviction. Could a prudent man, bearing in mind a prudent agent in this case, have reasonable cause to believe at that point Mr. Schneider was committing an offense. I submit clearly he would, based on the following:

Item one, we knew there was a theft approximately six days before of a load of Stanley tools.

Item two, we know the tractor stolen in the course of that theft from the premises of the truck lot in Bridgeport, Connecticut, had been recovered on Staten Island just a day before. I believe Agent Quigley's testimony was the truck had been recovered but

as a factual matter we know it was simply the tractor but he had been advised there had been a recovery of a vehicle related to the theft on Staten Island the day before.

Additionally, there were descriptions of the goods on the shipment. Number one in that respect the agents knew that they were concerned with a load of hand tools.

Number two, they knew that there were cardboard cartons involved and number three, they knew that the cartons were of a certain dimension or dimensions or given to them, and finally, they knew that at least some of the cartons on the shipment bore a distinctive Stanley label, which was yellow in color, with black lettering on it.

Then in the course of the afternoon surveillance by Agent Gonzalez disclosed the movements of vehicles. I would submit prudent agents, experienced agents as they were on the truck hijacking squad, were in a position to be able to conclude, based on what they knew from their experience and what they heard happening over the radio, that vehicles were being positioned inside a building, in particular 226 39th Street possibly for purposes of a transfer.

Most importantly, though, there came a time in

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the afternoon surveillance when after these movements of vehicles had been disclosed that Agent Gonzalez testified that he observed Mr. Schnitzer and another individual placing into the trunk cartons, that is, into the trunk of Mr. Schnitzer's car, cartons which matched in terms of the color and shape the cartons which had been reported being the stolen shipment. I believe Agent Quigley testified the dimensions were given. Clearly Agent Gonzalez did not say he saw any labels.

At this point the testimony was that the agents or the decision was made in the car by agent Goode in which Agent Quigley was sitting, to go in. I submit that this means to approach the premises and to see what happened at that point. Agent Quigley arrived and at that point he saw Mr. Schneider with the carton bearing the yellow label and he saw Mr. Schneider run into the premises.

I would argue based on the totality of the circumstances the agents at that point, particularly Agent Quigley, who made the decision and who followed Mr. Schneider into the premises, had probable cause to believe that a crime was being committed, particularly in view of the fact of seeing the label coupled with Mr. Schneider's flight. I think it is the only conclu-

sion that could be drawn and I think it can be looked at in another way.

I think that quite certainly Agent Quigley could have been criticized for not doing other than he do. I would submit that based upon what had happened and Mr. Schneider's flight there was no alternative for Agent Quigley other than following Mr. Schneider into the premises. I do not think any other action would have been appropriate under the circumstances.

Inside the premises Agent Quigley testified to the arrest and the observation in the course of the arrest and the securing of the area of the cartons of Stanley tools. Significantly, he observed inside the premises as he advanced through the vestibule door into the garage area, he testified that he observed cartons in the corner by vehicle number six. I believe these cartons are seen in the photograph which I believe Mr. Sonenshine has, 15, 15-A.

One final point I think is significant to note and that is, Mr. Schneider did agree that when he left his vehicle with the trunk open and went back inside the premises, he left the door to 226 39th Street open, the pedestrian door, the roll-up door was closed. Outside it shows this in the picture of 226 39th Street, is the name No Name Transportation Co., which appears

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over the door.

Clearly this was a going concern and a business. I would submit, your Honor, that leaving aside the facts which I have outlined and which I submit took place, it would have been entirely proper for Agent Quigley, even assuming Mr. Schneider was not outside, to walk inside the premises of a going business, witness the fact the trucks were coming in and out, and all afternoon people were seen outside. Had he done so, he would have been in exactly the same position as he was when he went through the vestibule door and although he would not have had the element of Mr. Schneider's flight before him, he would have been in a position and legitimately in a position where he could see Stanley cartons, which he would, I submit, have probable cause to believe were from a stolen shipment. I would submit the observations in the garage area of the premises were as a result of observations made by agents when they were in a position where they had a right to be based upon the pursuit of Mr. Schneider into that area.

I think it is clear and I really do not see how it can be argued otherwise that starting from that point it was entirely proper and indeed necessary that Agent Armstrong, when he entered the premises, go upstairs and investigate further. He testified that he searched

downstairs and no other people were found downstairs and clearly the agents knew from the surveillance that there were at least three other people inside the building from the surveillance, Mr. Schnitzer, Mr. Lemanski and Mr. Montevecchi. Upon finding this large quantity of what the agents had cause to believe was stolen goods, they had no alternative but to further secure the area to protect themselves and also to prevent the destruction of any evidence.

(continued on next page)

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A 90 MR. SCHALL: I submit again, except for purposes of argument the agents were legitimately inside the garage and legitimately made the observations in the garage they did. I do not see how it can be argued that the ascent of Agent Armstrong to the second floor and his observations inside the office on the second floor were anything but entirely reasonable and indeed the only course that could be followed under the circumstances.

Just to briefly add, the items which he saw in the upstairs office were in plain view as he testified when he arrested the various defendants up there, both in the main office and a small or side office just off that where the open file cabinet with the gloves was observed.

Finally, just turning to the search of Mr. Schnitzer's vehicle I would simply refer the Court to the cases which we have cited in the footnote, 3 on page 11 of our Memorandum of Law. I think it is clear that at that point, we are now talking at the point where the agents had made the recovery downstairs and upstairs and the defendants arrested, there was probable cause to believe that the items that had gone into the trunk of Mr. Schnitzer's car were goods from the stolen shipment and it was proper

for the agents to obtain the keys and to search that trunk without a warrant.

I will rely primarily on the cases in our footnote there.

Finally, I have nothing other to add in the oral argument at this point. I would simply ask if the Court has any questions and I just ask a brief of time if I might at the close of defendants' arguments to have an opportunity for rebuttal purposes. But I will ask now if the Court has any particular questions, otherwise I would be complete with my direct argument.

THE COURT: Let me focus my questions perhaps after defense counsel have presented their arguments.

Have you agreed on how you will handle the argument?

MR. SONENSHINE: We have had no opportunity to discuss it. We have been going without stop. May I ask your Honor to give us a ten-minute recess. I think that time received will be well worth it in time saved so that we do not get too much repetition.

MR. HOCHHEISER: He said you will not get too much repetition but he did not say we would eliminate it.

(A recess was taken.)

THE COURT: What is the good word?

A 92 MR. HOCHHEISER: We do have it worked out, your Honor.

MR. SONENSHINE: I think we have it somewhat organized and I would like to thank your Honor for your indulgence.

May it please the Court: I would like to begin by pointing out to your Honor that in my argument which I will try to keep as brief as I can, I will focus on this case from two different directions: One, with respect to the findings of fact that should be made here and secondly, with respect to the argument that would prevail irrespective of the findings of fact.

To begin with, we have a situation which so far as I can make out presents unusual factual patterns that one normally does not see, I think, in a hearing pre-trial and motion to suppress.

We started out with Agent Gonzalez whose testimony to put it mildly I think leaves a great deal to be desired.

The entire focus of this case has become obvious to everybody in a factual sense and that is the events occurring on the sidewalk in front of the premises between the point where Agent Quigley and the others in the car with him decided to move on to

39th Street and the entry into the premises within a space of probably a minute or less.

We have Agent Gonzalez, who seems to have taken pictures of events that no one would ever dispute in any event and at the crucial moment of what probably could have been the most significant picture in the case from a fact-finding point of view, we find he had no picture. He offered various explanations which were themselves inherently self-contradictory but basically they came down to the following:

Firstly, he said that he could not see anything very well anyway because of all the convergence of cars and traffic going by which was negated by fellow agents, the other agents in the case.

When that did not seem too feasible he decided his camera jammed and that is what prevented him from taking a picture. There has been the clearest possible proof in this case that Gonzalez could not be telling the truth about that under any circumstances, irrespective of any plausible or implausible explanation. I think that is an extremely significant fact in this case because in dealing with credibility issues when it becomes a pattern that a Government witness is just not telling the truth, even if it were to credit him with a lapse of memory or whatever, the fact remains

he is not telling the truth about what occurred in that interim period from the car moving off Third Avenue into 39th Street and the entry into the premises. It just doesn't hold water no matter how much credit you want to try to give it.

Now, the significance of course is whether or not A, Arnold Scheider was in fact out there for the second time after having moved his car and even so, whether or not he had in his hand the box of Stanley Tools which no one at that point concededly knew anyway, as to what kind of tools they were or boxes they were.

And now we find a second startling factor again, the most critical piece from the point of entry on would be the box that Schneider would have held in his hand if Agent Quigley's testimony were to be credited. What do we find? We find piled upon the first startling coincidence yet a second, the box mysteriously got lost, disappeared, was overlooked. So we now have a situation where trained agents have twice either blundered or fabricated a story of the most critical factors in the case: One, whether Schneider was there and two, what boxes if any or box if any he was alleged to have been holding.

THE COURT: With respect to the box, the

possibility of fabrication does not seem very likely because there are in the photographs many boxes of Stanley tools. If he wanted to fabricate one he could have picked up any one of the boxes off those trucks and put his initials on it.

MR. SONENSHINE: I am sure he could have.

THE COURT: So the conclusion seems quite apparent to me that with respect to the box at least we are dealing with a blunder, as you put it.

MR. SONENSHINE: I am not sure of that, Judge. I would like to point this out. I thought about the same thing and I have come to the following conclusion which I think resolves the problem. Of course, there were a great many boxes in that garage and of course an agent who wanted to fabricate could say well it was the other box and overcome the problem except that he would run into an even worse problem and that is, that if Arnold Schneider held that box in his hand, picked it up presumably in the premises and walked out with it in his hand and came back in again and carried it all the way until an agent took it from him, there would be his fingerprints on that box and so we find a situation where an agent would find himself having to, assuming he did such a thing and I think they were too smart to try that, he would then

find himself in a position of saying this man picked up a box, walked out with it, turned around, walked back in with it, carried it there through all these machinations inside and there is not a fingerprint on the box.

It is not quite, if I most respectfully may say to your Honor, as simple a solution as the one that occurred to me as it did to your Honor. I had the same thought and I thought about it. Obviously, it is of significance, so we find these two situations.

Going a little further, the agent says he arrested Schneider at one point in the garage and Schneider says he was arrested in fact at a different point in the garage. You can say what is the significance of all that? To a certain sense it probably would not be significant. Again, except for one fact and I am going to begin by asking your Honor to look at Exhibit 15-B with the aid of the magnifying glass, if your Honor deems it appropriate, at the workbench shown in 15-B at the right-hand side of the photograph and there is, unless I myself misjudge, and it takes a little bit of close looking, is the hubcap and the hammer on top of the table toward the left, that is the left as you would be facing the table if you were standing there, which lends credence to

Mr. Schneider's version of the event.

Your Honor heard Mr. Schneider testify. I think he testified straightforwardly on a basic set of facts. I think if one were to compare Mr. Schneider's testimony with that of Agent Gonzalez I do not think there would be any choice left but to assume that the truth was in Mr. Schneider's testimony and not of that of Agent Gonzalez.

Mr. Schall argued -- well, that is on the second phase and I will reserve that for the moment.

Factually, there has been an argument made that Mr. Schneider fled and consequently that should be evidence of guilt, so we do not need probable cause any more because that is the probable cause, so to speak. Well, first of all again on the assumption Mr. Schneider was in fact outside, I do not see how any normal human being and I do not care who he is or what he is doing, as he sees a car come at him in that fashion with no idea who it is and which Agent quickly himself acknowledged if he did not stop the car and Schneider did not get out of the way Schneider could have been killed, and obviously in that split second one does not go through all that logical rationale, one simply gets out of the way of the car. It does not help to worry later why it happened if you are stretched out with a car on top of you.

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MR. SONENSHINE: I would say that is the weakest conceivable evidence of flight, assuming it has probative value at all in the context of this case.

The argument is also made, after all, this is a garage, a place of business and there are trucks moving in and out and people working on them. I can only say to your Honor, so what. What would one expect in a trucking business? Certainly that cannot be probable cause or even assist in it. If anything, it would tend to negate any of the probable cause based on the idea something sinister is going on.

The testimony from the agent, himself, acknowledges there was nothing sinister about it nor did he see any criminal activity of any kind.

Finally, we come to the point where I am going to assume your Honor reaches the conclusion which I certainly hope you do not and which I urge you should not. Let us assume your Honor comes to the conclusion Agent Gonzalez gave the gospel truth, Quigley gave the gospel truth and Morill gave the gospel truth. What would we have when we take all that?

I submit to your Honor we have nothing in terms of appropriate probable cause. Let us see what it really comes down to.

First of all, in a normal case one expects or

finds because that seems to be the pattern that develops, that there is either testimony that an informer told them there were stolen property in that area or in the premises, or some anonymous tip or some piece of information that does not exist in this case. So it is not a situation where some otherwise innocuous observation is made creates probable cause when coupled with some sort of a tip or hearsay or rumor or anything of that kind, you do not have that here.

You have the agents, inexplicable as far as this record is concerned, observing this garage. As such, they could observe any garage in the city. In fact, on this theory they could observe any garage in the city of any trucking company and Stanley tools are sold all over the country if not all over the world. And the minute they see somebody handling a package of Stanley tools, which they did not even see in this case, the minute they see that they can break into the premises and lock up everything and decide what have they got. That is what happened here.

No matter how you twist it, taking their testimony and even as gospel, they started at this point and so far they have observed up until a certain point nothing of any real significance in terms of probable cause. The first thing that they observed that means anything

and it really ultimately has no final value, is somebody putting two boxes into a truck.

THE COURT: Four.

MR. SONENSHINE: Four, excuse me, I am sorry, four boxes into a truck. That is about the size of what they saw, which has as much sinister connotation as somebody changing his tire, particularly when one considers they had no prior knowledge of expectation against which to weigh this conduct because they simply were sitting there without any explanation other than presumably they were suspicious.

What did they next see that they say means anything? The Schneider situation and once again what did they see? Assuming you believe every word that was said in that regard, they see Schneider, they see him with some packages which at the best they could say had a yellow label on it and yellow is certainly not an uncommon color, the packages as to size, they were told averaged all over the lot, there was nothing unique about the size because they were told they had packages of all sizes, big, small, in-between, narrow, wide, and so on. Any box in the world could fit that description. It is like saying they had seen a male, 35 years of age, average height and average weight. It has no real significance, particularly again I emphasize the fact

that they had nothing to tack it onto which would convert innocuous conduct into suspicious conduct by virtue of prior knowledge, they did not have that.

So now they decide back here even before they really knew what they were doing other than they made up their minds they were going to get into that place, they come careening around the corner. They had not yet seen Schneider, they know absolutely nothing, and yet they form the obvious intention, that is, by Quigley, to enter the premises.

I would say here, that if they grabbed Schneider outside the premises they would have no legal basis for arresting him on that spot. I would say that at that point if they applied to a magistrate for a warrant it has to be turned down because what they can really say is, "We are interested in a theft of Stanley tools. We noticed a garage. We can't tell you anything about it and we saw a couple of people come out with packages."

I would say to go further in the argument and urge your Honor, even if they had seen the labels that said Stanley Tools coming out of the warehouse, they knew nothing, they would still not have probable cause. It is certainly diminished even more by the fact they did not even see the label, Stanley Tools, until after they made the arrest and entered the premises.

A 102 Then we have the testimony of Morill which is almost incredible. They were wandering over the garage and never came upon Quigley or never heard him. Perhaps they didn't want to have knowledge what he was doing or where he was because it might contradict his testimony. It is not to me of the greatest significance other than the fact it once were in the case there is something inherantly wrong with the Government's position in this case both factually and legally in the manner I have outlined.

Thank you very much and I hope I have kept within a reasonable time.

THE COURT: Thank you, Mr. Sonenshine.

MR. SONENSHINE: A talent I do not always possess.

THE COURT: Do any other defendants' Counsel wish to be heard?

MR. HOCHHEISER: Just briefly, your Honor. Basically, I will confine my remarks to the time prior to the entry into the building.

We have agreed amongst ourselves that one Counsel would discuss basically the law, Mr. Schnitzer's Counsel will discuss the trunk aspect and other Counsel will discuss things that happened inside the garage.

I just want to say since I am going to be brief, rather I would take the liberty in having just a little

conversation, perhaps. It is really very sad to me, Judge, as a young lawyer, to have to be standing here in a United States District Court pretending to be arguing law when in fact the factual evidence which was supposed to be that which around we are to fashion the law as it exists is, in my opinion, most respectfully, a sham.

It is only fortunate, your Honor, there are two things, one actual and one psychological, it is fortunate, I feel, that we are before the majesty of the United States District Court, and I firmly hope and I honestly believe that your Honor is going to call it as the Court sees it without fear or favor. I have to say I would not feel that in every court in every jurisdiction in which I am privileged and sometimes have to practice.

The psychological factor that makes me feel somewhat better is that we are not dealing with a heinous narcotic case or case involving personal injury where I feel no matter who wears the robe there is a psychological factor that after all some bad people are taking advantage of a constitutional rule of law, that is inevitable, and I would experience the same thing as the judge.

Your Honor, the Court itself in order to survive

must have some remedy, some prophylactic device to prevent intelligent, clever, devious people from coming within these halls and lying for their own benefit, I do not mean their own benefit that they are going to derive monetary profit to accomplish their ends.

Judge, if it were not fortunate from the outset that photography happens to be my hobby and it was not why I was chosen to be a lawyer here, for no one knew the situation would come up, you would be sitting thinking that those pictures, exhibit B, were probably ripped in the camera and number 1 through 14 were taken for development and the others were lost.

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MR. HOCHHEISER: (Continuing) It's only Gonzalez' lack of insight into the mechanics of a camera that prove that that explanation for not taking a picture of Arnold Schneider was not true.

Mr. Murphy, from the laboratory, who testified, put the lie really to the other explanation. And that was that the camera jammed precisely at the moment that Mr. Schneider came out. Because Mr. Murphy -- and I think it was obvious from the other testimony and the cross-examination of Gonzalez -- established that any jam in that camera -- and I think he reluctantly explained that there was a possibility of a jam, although we gather from his testimony that the probability is that it's just so remote that it's unlikely -- and I think he was very uncomfortable and unhappy about this task -- that any jam might have in the most remotest of possibilities occurred -- had to occur after the last picture on that roll. So that as your Honor observed in one of the arguments and one of the colloquy, the jamming really is irrelevant because it cannot account for Gonzalez' failure to take a picture of Mr. Schneider.

And really what we have here unfortunately is an FBI agent who's in the uncomfortable position of being the man holding the bag, so to speak, because he

is the photographer. He has to blow the case for them or he's got to wriggle around some way. And it's regrettable that I have to say it, your Honor, but he wriggled and he waggled. And he said, it jammed. That's why he didn't take the picture. And then when that didn't work, and it was obviously -- obvious that that wasn't true, he said that a truck went by. And before that he said that he left when Schneider came out. And that's why he didn't take a picture. But when we developed that little piece which looked so innocuous enough before we had it printed, and it turned out that those were FBI agents, and other testimony established that they could only have been there 15 minutes later. So that explanation was -- lets not say a lie, but it wasn't true.

Every explanation that Mr. Gonzalez gave for not having a picture of Arnold Schneider was not true. And what is probably the -- as human beings say, being in this uncomfortable position of holding the bag, but really what he wanted to do was get away from this. It is not his case. He didn't want to have to be a perjuror. He didn't want to have to make up a story.

He said Schneider came out. And he got very confusing.

"And I got out of there. Don't ask me any more about it."

Because there is only one truth. There is an infinite number of fabricated stories on a particular point because such a thing by definition never happened. So Gonzalez couldn't tell you what Schneider looked like, exactly what happened, because there was no objective truth to recall. It never happened. So the best he could do initially was -- he said, "I got out of there."

When we proved he didn't get out of there and he was basically in the same position, he didn't know what to say. So he said his camera jammed, and he put it down.

Then we proved that it didn't jam. At that point really it was just inaccuracy after inaccuracy, after inaccuracy.

You know, it doesn't do the Government any good to say, "We are not obligated to take pictures. If we didn't take any pictures, we wouldn't be in this trouble."

A bank isn't obligated to take pictures one every 16 seconds from those cameras that go off either. But if they are there and someone says something happened in the bank, you could subpoena the pictures

and see if anything like that happened in the bank. I had a case like that.

It doesn't do any good to say, "We are not obligated to have cameras."

As your Honor observed, I think, during one of the colloquies, pictures were taken of everything from meaningless, to questionable, to unknown activities of unknown significance, to obviously important activities like people carrying boxes and people -- to identify people even. Any person that came out who they didn't know -- and I think the evidence established that they didn't know Mr. Schneider until they got inside and he identified himself. As one of the agents said, "I know, you're Arnold Schneider."

So that it was important not only to take a picture of the box, but to take a picture of Schneider, just as it was important to take a picture of all the unknown males so the FBI could find out who these people are.

The reason that they don't have the box, Judge, is that if you can imagine what a box of screwdrivers or wrenches or pliers weighs, you could see that nobody -- and I know that they said that he had a display case. Nobody could run with a box -- you know, it's got to be 30, 40, 50 -- maybe more. I don't

know. A box of steel, does it weigh as much as a weight that you put on a set of weights? It's a box of steel with plastic handles perhaps. A box of hatchets. A box of screwdrivers. How much does such a thing weigh? Can you run all over a garage, and run through here? Would you -- even if you could run through here, hold the box, from people who are chasing you? Do you think the people are hold-up men, do you hold onto the box to run away from them, or do you get rid of the box? If you think the people are the police or the FBI agents, do you hold the box? If you had a box, would you hold a box like that? No.

The only box that could come up with to fit in with this event, which never happened, and that's why they have no picture, is a box that weighs five pounds. And the testimony was that it's a -- it weighs five pounds and it is a display case.

Here is a man who presumably has a truckload of valuable Stanley tools. I'd like to have some of them myself. They make wonderful tools. And they are very expensive.

Now, if you saw a retailer or a salesman on the road with a display case going to the trunk of a car, maybe he has some use for it. What would -- assuming

for the purposes, you know, of this argument, everybody is guilty. What would a thief do with a display case for Stanley tools? Hang it on his wall?

If he was going to take something out of there, he would take something of value. A box of useful, pretty tools to sell on the side, to keep for himself, to do what he wants. But a display case, no. That was picked because it was the only thing that weighed five pounds. The only thing that could fit into this fabricated story that someone ran around like this holding on to the box, so that he could be discovered with the evidence in his hands.

And then, of course, as Mr. Sonenshine pointed out, we have fingerprint reports. There are fingerprints taken from some of these boxes and the places and things that we heard the testimony about. They fingerprinted all kinds of things. They couldn't fingerprint that box. They'd get back a report saying that the only hands on there are FBI agents. Why theirs and nobody else's? Didn't happen.

So they gave that box the deep six. And that's the end of the box.

There's those photographs. They thought they ripped the film. They couldn't cut it right at the end of the negative that made Exhibit 14 or 14-B. The

last picture of Schneider. I mean that would be a little too much to bring into a Federal Judge with a clean cut and say, "Here, Judge, you know, well, we don't know where the rest of it is."

So they made sort of a jagged cut. And in doing that they had to cut off the last picture. Well, that isn't going to mean much. Nobody will worry about it. Nobody did until we had it blown up to an 8 X 10 and put it in front of them and then they said, yes, that's Agent -- whoever it was -- one of the agents in the case.

Now, it seems clear, you know, internally the probable cause for the case really has to be -- it really has to be that Quigley say what a reasonable prudent agent would conclude was a box of stolen Stanley tools within a split second under harried conditions. But, you know, even that doesn't make a lot of sense. If Morrill is correct that he saw Schneider at the back of that Cadillac with the trunk open -- and this is at 150 feet away -- presumably, from their story, Schneider is putting a box in the trunk of his car. If he was putting the box in the trunk Of his car, and Morrill saw him standing there from 150 feet away, and the trunk was already open, wouldn't the box have been in the car when they got

there?

Did Schneider stand there?

I know it's speculative. But Schneider is standing there. When Morrill gets there again, they can tell you the details about everything. But nobody really wants to get into too great a detail about this event. Because there's an infinite possibility for the details of the event because there is no objected truth to recall. Morrill doesn't really want to tell you exactly what was visible, exactly what the scene was.

Oh, he has to tell you to some extent when he's pinned down, but he only sees the top of Schneider's head. He doesn't want to tell you too much about the box. He doesn't have the nerve to say that he saw a yellow label on this box that we saw. He takes himself out almost Gonzalez takes himself out. By the time he gets out of the car Schneider is already in the garage. He sees nothing. And Quigley is chasing him.

Someone made a radio communication and told ten or twelve or whatever number of agents, to converge on that place and to take it. They put that -- that place was in effect inevitably under their control from the time the Quigley automobile left the area. A car

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came from over here. A car came from over there. Perhaps other vehicles. They took that place over. Whether Arnold Schneider was outside or not, that place was going to be taken over.

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MR. HOCHHEISER: (continuing) Well, is that a mere coincidence that that happened? No.

I submit to your Honor that what happened was they sat there for hours and hours. And, by the way, here's Quigley running at a great rate of speed, after sitting in an automobile for six hours. Again, speculative, but, you know, you don't do your best time under those conditions.

What really happened was they waited and waited and waited. And they waited for probable cause. And they waited for the right moment. And it never came. The place was being locked up tight as a drum. It was quiet. Nobody was playing with the trucks anymore. Everybody was upstairs doing whatever they were doing. People were leaving. Schneider opened up the trunk of his car. He came out. Hehad his jacket. He was getting cleaned up. He went back in. It was obvious - "This is it, fellows. This is it for the day. We have to come back tomorrow if we are going to do more of this."

Schneider turned his car around. He's going back home. So that was it.

"Let's go, fellows. That's it. That's the most we are going to get. Let's hit the place now."

Agents aren't like policemen. And agents and

policemen in a big urban area like New York are more sophisticated -- are more sophisticated than policemen in other parts of the State and other parts of the country. So when you get into it, we get more sophistication in agents because they are better educated and better trained and probably brighter as a cross section. And what happened is this. Lawyers like myself come into Court and speak to a Judge like your Honor and we talk about the law. And actually the four days that we spent here is in the minds of the agents already predetermined because they know as much about probable cause as the lawyers do. And they have already made up a set of facts to fit into it and all we are really doing is -- is participating in a charade. And we are really the victims -- the Court and the lawyers, because the lawyers presumably know what really happened, and the agents have made up a story to fit within the law that they know that you and I are going to adapt as the rules of the game.

So it's really unfortunate that we have to stand here and argue about facts which never happened and can never be proved because they never happened.

Now, I would simply point out to your Honor, as Mr. Sonenshine has said, even assuming the state of facts for the moment that Arnold Schneider is outside

with a box. As testified, those facts did not establish probable cause. A fleeting glimpse in a fraction of a second of a brown box, which is the garden variety color for cardboard boxes with a yellow label, which is one of the most appropriate contrasting colors to put on a brown box, and which is not uncommon, does not establish probable cause. But I would ask your Honor to understand, to believe that even that poor quality of probable cause evidence is really better than what it really was in fact, because when we take photographs and we take notes and we sit down and we discuss things, agents, witnesses, naturally from looking at the photographs, the testimony and the judgment of the time becomes meaningful and stronger, and we really -- the difference between the now and the then really becomes indistinguishable in our minds.

By example, if we took Gonzalez and took away the photographs that he couldn't see again what it was that he was taking pictures of, his testimony would have taken about five minutes. I think he would have just sat there and said, "I really don't know. I took a lot of pictures of people, you know."

And that's it.

Having the pictures to look at, et cetera, he can reconstruct it and discuss it. So the extremely

poor quality of probable cause evidence that we have is in fact probably at least a hundred per cent better now than it really was in objective facts in the mind of Quigley. Then even if it happened -- because now Quigley can come in and say, "Yes,we got the descriptions. Yes, I saw the yellow label in a split second."

Really, who's to say what he saw when he's reaching for his gun coming out of that automobile?

And it doesn't do any good, your Honor, to say that this is a commercial place. You see, what I call the inevitable doctrine, that we were going to approach Schneider and we were going to go in there and see who's home and ask some questions.

Well, that didn't happen. They pulled up as fast as they could in order to take control and custody of that place which was a warehouse, which was not open to the public really.

Assuming that a crime was being committed there, the door was locked. When Schneider left, he locked the door. He left it open for a moment because he was going to come out. You don't want people walking around there. It's not open for agents to go walking around in there.

Presumably, you have to knock on that door if Schneider closed it and locked it. They went in there.

They drew their guns the moment the car hit that sidewalk, which was at least 40 feet away from Schneider.

And if your Honor were again to look at the photograph showing the arrows, the X where Schneider was at the rear of the Cadillac, and the circle with a C in it, where the oil car landed -- and I think there is a man approximately at the corner at the time when the picture is taken, although he may be further behind the Cadillac, I think you can really get the flavor of what you can see, and more importantly what you can't see from that position, Judge. You really couldn't see anything about a box. And if it's in a man's hand, you couldn't enough that would come up to the time the probable cause that a Magistrate would require to issue a warrant. Assuming that we could stop the clock and have a Magistrate evaluate it at that point. It's impossible and it just didn't happen. And basically that's it.

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In conclusion, I would just like to say, in connection with the remarks I made about the need of the Courts not to be taken in by this kind of affronting testimony, this kind of fabrication and not to go along with it consciously or unconsciously to affect the obviously desirable objectives of eliminating crime, etc., that the survival of the Court itself depends upon the kind of strength and independence that just rejects that kind of testimony and not accept it and grant the motion like that, because looking at it from reverse, starting with the conclusion instead of from the beginning, if I as a lawyer cannot establish my point with the kind of quality of evidence that we have seen in this Court room, then as I have stated to my brethren at the table, I really -- in order to win such a motion -- if I can't win it now, I really need evidence of the quality sufficient to indict people for perjury, which means such a motion, though it is available to us, is not a reality. Most respectfully, Judge, this kind of quality of evidence is enough to carry the day for the Government, then I can't imagine what is necessary to carry the day for my cause. I thank you sir.

THE COURT: Mr. Hochheiser, before you sit down --

MR. HOCHHEISER: Yes sir.

THE COURT: Assume I would find that there was a place of business, that it was open, what would be your response to Mr. Schall's argument that whether or not Quigley entered in hot pursuit; that once he had entered and then in plain view of two of these cartons, and that was sufficient to give probable cause for the arrest.

MR. HOCHHEISER: Plain view where?

THE COURT: In the --

MR. SCHALL: Do you want the photograph?

THE COURT: Right hand corner. This is the photograph that you asked me to look at. That's next to the front left fender of vehicle 6.

MR. HOCHHEISER. Yes, Judge. My response is simply this. This interior door going into the garage, according to Schneider -- and there's no contradicting evidence on the point -- was kept generally locked. Whereas he said not a sliplock, but a dead bolt, he opened it because he was going to come right out. He left it open momentarily. And since the Government's position was not probably cause was based upon the commercial aspect of this, there was no evidence, I don't think -- but there is a sign indicating that the office is upstairs. The proper cause for a pedestrian when you walk in here would be to go upstairs and inquire

in the office. To walk into this door, I think, your Honor -- well, if you and I were to walk in there, Judge, we didn't know -- there was no activity going on in there, I think we would stand by the door and we'd say, "Hello, is anyone home?"

I think we'd do that, your Honor, in natural deference to another man's place. To walk in among these trucks --

THE COURT: No.

MR. HOCHHEISER: To over here. --

THE COURT: The testimony by Quigley was, as he went through the door from the vestibule into the garage, he did see cartons in the far corner over there by the left front fender of the vehicle 6. Now, my question to you is, if you assume -- and so far you only tried to controvert my assumption. Assume that this was a place of business and they had -- they had come in the door, were standing in the doorway of the entrance into the garage from the vestibule, you could see these cartons; let's assume that he could see labels. There's no testimony to that effect. Would that be probable cause to arrest Mr. Schneider, who was standing somewhere near them.

MR. HOCHHEISER: I don't think that is probable cause to arrest Mr. Schneider when you don't know who

he is and what his connection with the place is. I think it might be probable cause to make an inquiry or to stop further activity in the place while some one went for a warrant to explain what they had. To go back one step: First of all, I don't know that he said that he was able to observe the labels on these boxes at that time. Secondly, I know that I am begging the question when I say this -- I wouldn't take his testimony as true. If I had found in the beginning --

THE COURT: I understand that.

MR. HOCHHEISER: And made up a story about Schneider outside, that would be the end of his credibility , as far as I was concerned, if I was listening to it. I don't think he said -- and that he saw suffi ciently to give a probable cause concerning those boxes at the time he was standing at the door. Though I din't prepare to argue that particular point at this moment and I can't swear to it --

MR. SONENSHINE: May I suggest a possible satisfactory answer to your Honor's question?

THE COURT: Yes.

MR. SONENSHINE: Thank y ou. Actually three things.

Firstly, I think perhaps most importantly, is that reminiscence of the United States v. Katz case,

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dealt with a telephone booth, and the argument was made that it's a public phone booth and why can't the Government intrude on the privacy of that phone booth. This is a booth designed for public use. The Court said you can do it because the man using that booth has the right to expect that it will not be invaded by others. That's firstly.

Secondly, I believe there are a line of cases that have to do with am entry into fixed premises for purposes other than a normal casual inquiry which accidentially develops a piece of evidence that might someday lead to probable cause having to do with the motive of the actor as they are going into that premises. A person who is going into that premises, as I say, to inquire, is there a John Smith garage on this block as well as yours, and while they noticed a quantity of heroin, that's one thing. It is quite another to go in there under the subsequently argued guise that it's a public premises when in fact the entry was there to make a search and for no other purpose.

So I say to your Honor that that is the second alternative or additional reason.

Thirdly, even assuming that he had a right to enter under any conditions, even assuming his motives

were the purist and were of some casual interest -- or even assuming -- assuming that his motives were the worst, that he had his suspicions about what was going on in the place -- either way, what would he see? He would see boxes of stolen tools. And where would he see them? Clandestinely in the cellar of a barber shop which has no normal connection? No, he would see it in a perfectly normal setting, bearing in mind that he has no prior information than his own suspicion, which is certainly not the equivalent of probable cause. So he sees a natural situation. He sees a trucking company and tools and other items in large quantities. He may see a box or two laying about and --

MR. HOCHHEISER: Also it is dark in there.

MR. SONENSHINE: I am assuming the state of facts that your Honor wanted me to assume for the question.

THE COURT: Yes.

MR. SONENSHINE: He sees a normal situation. That's all he sees. A truck company handling merchandise which could have been -- very well have been at that moment in 50 or 100 different transportation companies within the area. And he certainly wouldn't have the right to walk into all of them carte blanche.

MR. SCHALL: Your Honor, do you want me to respond or wait for the --

THE COURT: No, wait. All right. If there are any more --

MR. HOCHHEISER: I wanted to point out, your Honor, in terms of the factual end of the question. You remember agent Morrill testified it was about 6 o'clock in September and it was dark in the garage. He said it was rather dark. They had a skylight. And he didn't recall any illumination. He said there was a -- Mr. Sonenshine called it a trouble light, which sounds like some sort of mechanic's drop light. I think it shows up in one of the pictures. They use that to illuminate the inside of the trucks so they can see in there.

So another response to your Honor's question, when you come in throught that entrance, you're really not going to see too much over truck 6 in a dimly-lit garage such as we have here.

THE COURT: All right.

MR. ABRAMS: Just on this point, I would like to suggest -- of course, your Honor's recollection of the testimony in this case as the trier of the facts is the one that counts. But my recollection --

THE COURT: Not when I have the record in front of me.

MR. ABRAMS: No. No, If that is what the record says then my recollection is not that he testified that

that is what he saw in the front of the premises near the tractor 6. I recall no such testimony. Now, there is a picture there --

THE COURT: Seeing boxes --

MR. ABRAMS: Seeing boxes there in tractor 6. I recall no such testimony. If your Honor says it's there then I --

THE COURT: It's there. It's also in my notes.

MR. ABRAMS: Well --

THE COURT: Identified in one of the transcripts.

MR. ABRAMS: The photographs were taken at a subsequent time.

THE COURT: No. But the witness, Mr. Quigley, identified in this photograph the boxes in the position where he said he saw them.

MR. ABRAMS: He saw them when though?

THE COURT: As he entered in pursuit of Mr. Schneider.

MR. ABRAMS: I don't recall that as being the testimony, Judge, but I will abide by what your Honor says it is your recollection.

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THE COURT: Who is next on argument.

MR. BERNSTEIN: Your Honor, if I could address myself to the hypothetical which your Honor raised on that assumed state of facts:

Your Honor, I want to reinforce something that Mr. Sonenshine said. I think that the critical element in the hypothetical which your Honor posed, taking the assumed state of facts, you know, for the moment, is the intent of the agent when he entered. I think there are a number of cases which seem to stand for the proposition that if he in fact entered with the sort of innocent motive that your Honor might indicate under a certain set of circumstances and that while there there happened to develop a reasonable suspicion with relation to a particular item, that would be one thing; But it seems clear that his entire intent in this particular matter was framed before he ever got inside the garage and before, assuming those boxes where he said they were, as I say, his entire intent was framed before he even set foot across the threshold into the garage, and I think that is the kind of intent that your Honor has to deal with.

THE COURT: I understand.

You are next, Mr. Adler?

MR. ADLER: Your Honor, this conforms with the

representation earlier, I will try not to repeat, I will try and address myself to I think some of the legal arguments which are applicable to the facts and not rehash any of the facts which have been gone into so ably by Mr. Sonenshine and Mr. Hochheiser.

As a general principle, your Honor, in a motion of this kind, I think your Honor well knows, and I think the Government well accepts as a basic proposition that all searches and seizures and arrests which are made without warrants are presumed invalid; and I think your Honor well knows, if you look into cases such as Schneckhoff versus Boste Bonti, 412 United States, page 218, a 1963 case, as well as in Coolidge versus New Hampshire, cited at 403 U.S., 443; I think if your Honor will look at those cases you will see clearly that in situations like this the Government bears a far higher burden than it would in a routine search and seizure.

But more importantly than all of that, to the extent that they are able to gain certain benefits in a close case when a warrant is obtained, well, none of those benefits accrued to the Government in a close case or are obtainable in a case such as this which are conducted outside the judicial process. I think your Honor will see this when it looks at the case of

United States versus Ventresco, repeated at 380 United States Report.

Now, turning to the question of probable cause, which is a threshold question in this case:

Your Honor knows and I think the cases indicate that probable cause has been defined as facts and circumstances within the agents' knowledge and of which they had reasonable trustworthy information sufficient to indicate to themselves to warrant a man of reasonable caution to believe that a crime has been committed or is being committed.

Your Honor has heard a factual summary both by the lawyers for the Government and for the defendants, and I think if you look at the cases, Harold versus United States, 267 U.S. 132 and Draper versus United States, 358 United States, page 307, you will see the application of that principle to those cases.

Now importantly, this is not a Draper situation, which is to say, as Mr. Sonenshine indicated, this is not a situation where pre-existing information was supplied by an otherwise reliable informant, and informant whose credibility had been checked out, such as he had given previous information leading to X-number of arrests and Y-number of convictions, and

more importantly than that, the surveillance which was testified to in this case, had been confirmed information which was supplied by a reliable informant. That is the Draper case, that is not this case. So it is the observations, the naked observations, the unsubstantiated, unsupported and uncorroborated observations by any informant, be it by a reliable informant or by an unreliable informant which is really being offered by the Government to your Honor as the basis for probable cause.

Your Honor, I submit that to the extent that it is being offered before your Honor, it does not measure up to the definition of probable cause as enunciated in the Draper and other line of cases. More importantly than that, the grounds for probable cause have also been statutorily codified. If you would look at Title 26, United States Code, Section 7608, Subdivision (a)(3), you will likewise see that to the extent that that section is applicable to the facts in this case the Government has not carried its burden of proof.

I would like to tarry briefly on the credibility question, and on the credibility question I will not rehash what counsel have said, but I would like to indicate and join with them and refer to a state case

within this borough, in fact, from the Appellate Division, Second Department, and I will dwell on it only briefly because this case is applicable not only to the State of New York but also to a prosecution in the Federal Courts, and the case that I am relying on, your Honor, is the casecalled People versus Garafalo, which is cited at 44 Appellate Division 2d, 85, and that was a warrantless seizure of untaxed cigarettes, and in its opinion the Appellate Division, Second Department, reserved a judgment for conviction of possession of these alleged untaxed cigarettes. The majority wrote:

"We refuse to credit testimony which has all the appearances of having been patently tailored so as to nullify constitutional objections. In evaluating testimony we should not discard common sense and common knowledge. This concept is well stated in Section 649 of 22 New York Juris Prudence, Evidence, as follows:

"The rule is that testimony which is incredible and unbelievable, that is impossible of belief because it is manifestly untrue, physically impossible, contrary to experience or self-contradictory is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case."

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MR. ADLER (Continuing) I submit most respectfully that the lessons in the Garofalo case are applicable, whether or not it is untaxed cigarettes, whether it is in a State Court or a Federal Court of the City.

I would also like to refer your Honor to an experience which I think your Honor was well aware of, although not a member of the judiciary of this court, and that was the situation which has troubled all defense lawyers in this State, involving narcotics prosecution, and those were notoriously the "Dropsey" cases which were discussed by the New York Court of Appeals in the case of People vs. Berioz, which is recorded at 22 New York 2d, and the problems in that case and in the Garofalo, and which is a problem in this case, in this courtroom, as Mr. Hochheiser has indicated, the problem is that here we have very clever agents well aware of what is to be established, and I submit respectfully, without rehashing, you have heard it, you have got to decide it, and I most respectfully submit that this was tailored to fit within what Gonzalez testified, as well as the other agents, and they know from their own experience and perhaps indeed with all due respect lack of experience in cases of this kind to try and convince your Honor

of the appropriateness of their actions.

So I will leave the question of credibility and move on to other areas.

Your Honor, I will direct myself lastly only and briefly to the hypothetical addressed to Mr. Hochheiser and to brother counsel, and that was, that concerns the question of the right to enter this commercial building, the No Name Transportation Company:

It has always been the law, and it certainly has been my understanding that Title 18 of the United States Code, Section 3109, and Supreme Court cases such as Curvacal make it quite clear that when an agent enters a premises like this, and we are not dealing with a car case which is movable, which is disposable, which can go across state lines, we are talking about an area within the confines of a parameter and the agents are obligated in 3109 to do certain things:

The case aide must announce his presence, his purposes, and the agent must indicate that he wants to gain entrance.

I submit most respectfully that the testimony in this case and particularly the testimony of the first agent who gained entrance into the premises,

Agent Quigley, indicates most clearly to your Honor that he did not say anything to Mr. Schneider from the time he exited his vehicle and chased Mr. Schneider into the No Name Transportation Company and did not say anything until he approached Mr. Schneider in the garage.

Even assuming your Honor wanted to accept some doctrine I suppose of inevitable discovery, some right for anyone to have entered the premises, I submit most respectfully that these agents were under a non-delegable duty to follow the teachings of 3909 of the United States Code. They did not announce their purpose and if they had announced their purpose at the proper place, then they would have had to announce that purpose at the threshhold of the garage, so that Mr. Schneider had every right to say:

You get out of my garage, I don't want you coming in here. If you want to come in here, you go down to Tillary Street, you go to the Magistrate and you get yourself a search warrant.

They could have secured the premises to have made sure that none of the contraband was removed, that none of the saws and rachets and hammers, I suppose, were flushed down the toilet, and I think that

that would be incredible. Your Honor, contraband of this type as opposed to narcotics which is easily disposable and there was no eminent threat of being disposed of.

I submit that even assuming your Honor's hypothesis, the failure to give constitutional notice and statutory notice under 3909 vitiates any rights under the facts of this case or your Honor's hypothesis to have come into that premises under those circumstances and to have approached Mr. Schneider under those circumstances.

Now, again returning to the arrest of Mr. Schneider, I would like to comment briefly on the observations of the agent focused upon seeing these alleged brown cardboard containers.

Your Honor, we are not dealing with that kind of a case, and we read these cases all the time coming out of the Second Circuit, the Appellate Divisions and the Courts of Appeals, we are not dealing with glassine envelopes or some of the tell-tale signs indicative of the fact that the contraband is present, that the crime is being perpetrated.

I submit that the possession of a carton of this size, regardless of whether or not it was labeled or whether or not the label was visable, that this did

not give rise to probable cause. All the cases which deal with particular tell-tale signs are unlike the case at bar.

As I indicated earlier, there certainly was not an underlying situation of pre-existing information.

On the aspect of flight, as your Honor well knows flight carries with it an inference that the actor is freeing from the presence of the Government with the intent to avoid apprehension. I submit most respectfully that the testimony in this case indicated that the agent's vehicle was not marked; there were no objective or subjective signs to have indicated to Mr. Schneider that these were agents. This is a high crime type of neighborhood, he had every reason to believe and to credit that being out on the street he was being pursued for either to be robbed or having someone steal property from his premises. I submit his actions in the context of this case do not give rise to an inference that flight was attempted. And in any case, flight, your Honor, as your Honor well knows, is probably the worst circumstantial evidence in importance in probable cause.

Again, as I indicated earlier, the failure to have announced their presence as FBI agents is further

corroboration of the reasonableness of Mr. Schneider's conduct, that is, if you are prepared to believe the agent's testimony that he fled into the No Name Transportation Company after having been out on the street.

Now, turning to the scope of the search within the garage:

It had been testified to by the Government that there came a time very shortly after Quigley entered the garage when Mr. Schneider was taken into custody; he was handcuffed, he was not free to leave. Within that context I believe most respectfully we are within the context of Chimel vs. California, which is cited in 395 U.S. page 752, and the Chimel case stands for the proposition that the limits to a warrantless search after an arrest has been made or a search incident to a lawful arrest is within the grabbable area of the accused and to prevent perhaps not merely the accused grabbing a weapon but perhaps destroying evidence such as in a narcotics case flushing contraband down a toilet.

I submit most respectfully --

THE COURT: You say they could not look into the trucks?

MR. ADLER: I beg your pardon?

THE COURT: You say that they could not look into the trucks?

MR. ADLER: Absolutely not.

THE COURT: Well --

MR. ADLER: Well -- I --

THE COURT: Go on to another argument, I won't buy that.

MR. ADLER: Excuse me?

THE COURT: Move on to another argument, I won't buy that.

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MR. ADLER: I will in just a moment.

As I indicated to your Honor, and I think if you examine the Chimel vs. California case you will see that once Mr. Schneider was taken into custody he was not free to do any of the things that Chimel talks about as a basis for an exception to the warrant requirements, the obligation on the part of the agent was to go and get search warrants, he had no right to look --

THE COURT: There was other people in the building.

MR. ADLER: Yes, sir.

THE COURT: They couldn't look for them.

MR. ADLER: They certainly did, the agents indicated that they went upstairs.

THE COURT: They couldn't look in the trucks for them.

MR. ADLER: I suppose they would have a right to look inside the trucks for them.

THE COURT: In that case then they could search. You are wasting my time.

MR. ADLER: All right.

Now, moving on to the other, and that is the area concerning the search in the upstairs office, Agent Armstrong went upstairs -- well, he went up the

stairway, and about midway up the stairway, he heard a voice, and after hearing the voice he went upstairs and saw a large office and saw gentlemen inside who asked him who he was, quite appropriately, and Agent Armstrong indicated that he was the FBI and they were under arrest. Agent Armstrong went into the room and told everybody to come down with him. I think it was Agent Armstrong's testimony that these gentlemen were not free to leave, although they were not handcuffed at that time. Clearly, they were taken into custody, they were under arrest for purposes of their Fourth Amendment rights.

Now, your Honor, turning our attention to the search in the upstairs office:

I suppose the Government's contention will be that all the evidence seized upstairs was seized in plain view. The landmark case in this area is Coolidge vs. New Hampshire, during the course of which the Supreme Court indicated that there must be a showing that the seizure on view was inadvertant.

I have been supplied with an exhibit ofthe Government which has a series of items which run over two pages and has a number of items which were seized in the upstairs area, and I had asked Mr. Schall prior to our resuming court today if he would address

himself during the course of his argument towards his contention as to why the Government had a right to seize from the upstairs office the six items enumerated from Desk No. 1, the eight items seized from Desk No. 2 and some four items seized from Desk No. 3, and then a whole series which fills up the rest of the page of items seized in and about the remainder of the office.

Now, our Court of Appeals has indicated in talking about the scope of searches after defendants have been taken into custody, and as in this case as the testimony indicated quite clearly, the six gentlemen in the upstairs office were herded downstairs, there was clearly no one else upstairs any more, therefore there was no contraband to be disposed of, nobody else had been seen or could reasonably be expected to have been in the premises any more, there certainly was no matter of egress out of the upstairs office, there was no back door to the garage, so now we have the seven defendants downstairs and they are arrested, and the Government then proceeded upstairs, and I submit most respectfully they conducted a search the contents of which were seized in that upstairs search, and they have been enumerated on the return which was filed pursuant to the search in this case,

and in that connection I call your Honor's attention to a Second Circuit case of United States vs. Rodriguez decided on March 11, 1976, that is slip opinion 2585, particularly the page 2593, where the Court of Appeals in discussing the limits of warrantless searches after arrest indicated, and I am reading:

"With the arrest of Caballo, however, the chain of justification ends. Jacobs testified that the purpose for searching the rest of the house was to insure the agent's safety and to see if there were any other illegal aliens living there. Apart from the question whether the agents exceeded their statutory authority, see United States Code 8, Section 1357(a)(3), this sounds much like the argument made in dissent by Mr. Justice White (joined by Mr. Justice Black) in Chimel vs. California" -- then there is the citation -- continuing "and rejected by the majority. We read that decision as requiring that, after Caballo's arrest, Jacobs and the other agents were required to do as best they could to maintain custody of the aliens lawfully arrested and surveillance of the house which a search warrant was being obtained."

I submit that the facts of this case, vis a vis the seizure ofthe items contained on the two page return given to defense counsel fit squarely within the

holding of that case.

The defendants are in custody, they are downstairs, they are not free to leave, the premises are secured, there was nothing stopping the agents making the 15-minute trip to this courthouse and going before a Magistrate and making whatever affidavits they could to obtain search warrants to search.

Your Honor, even if your Honor were prepared to assume that the contraband seized downstairs is admissible into evidence, your Honor must suppress the documents and the tools and the related paraphernalia set forth on the return which was seized in the upstairs office after the six remaining defendants were taken into custody.

Before I conclude, your Honor, I would like to indicate to you that as your Honor well knows, and as is cited in my moving papers on the motion, there is a longstanding proposition that where the Government has sufficient time to obtain warrants, they must obtain warrants, and I cite United States vs. Watson and the cases cited in the Watson holding.

Your Honor, I submit most respectfully that the Government has sufficient time before they went into the premises to obtain the warrants, even assuming arguendo that your Honor is prepared to disagree and

prepared to uphold the seizures which were seized downstairs from the garage, from the trucks, the items of tools and so on which were in the downstairs portion of the garage.

I submit most respectfully under the holdings in this search and under the Watson case the agents were under a duty to have obtained the warrant to search the upstairs, and I submit that the testimony in this case is clear that they conducted a general search of the upstairs office and they had no right under the Constitution or the statutes to have done that which violated their duty.

I submit most respectfully that the sole remedy for the conduct in this case is the suppression of the evidence seized at the premises, and I call upon Mr.Schall to justify, if he can, the seizure of all of the items in the upstairs office because I submit most respectfully that neither the record in this case nor the arguments made by Mr. Schall substantiate the right to seize the items in the upstairs office placed where they were in the drawers, in the file cabinets and lying in and about the desks. The agents had no right to remove those items from the desks and to obtain that evidence in question.

I submit that the seizure of this evidence in

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question does not satisfy the plain view doctrine that it was inadvertant; it was intentional, it was a general search, the evidence should be suppressed.

Thank you.

(Continued on next page.)

THE COURT: Yes, Mr. Abrams.

MR. ABRAMS: If your Honor please, you have heard much argument of defense counsel and I am not going to bore you by rehashing whatever you have already heard. You have sat here and you havelistened to the facts and I will rest much of my position on the arguments of my colleagues.

Your Honor, there is just one point which I think is very important for your Honor to take into account and to consider. It has been said in another fashion, but I should just like to point it out:

It appears to me that one of the things that your Honor has to contend with in deciding whether or not there was probable cause here was the state of mind of Agent Quigley at the time that he left 3rd Avenue at 39th Street and started down 39th Street in that vehicle that was traveling at a speed of 40 miles an hour.

Now we have no testimony here as to the reason that the surveillance was taken up by the FBI at the premises, so therefore we are unable to look and see whether there was any information and what information was given to Agent Quigley at the moment just prior to the time when that car started out from 3rd Avenue down 39th Street.

Now if you will recall the evidence that they had been receiving transmissions concerning cartons and dimensions --

THE COURT: That has been covered.

MR. ABRAMS: I know, but --

THE COURT: Why re-cover it?

MR. ABRAMS: I know, I told youthat, I am just directing myself to this particular point which I think came out in my cross-examination.

It appeared to me when I cross-examined Agent Quigley that he said that as that car made that turn and they were going down 39th Street it was his state of mind to make an arrest based upon the information that he had.

Now I submit to your Honor that based upon that information which was merely the testimony that you heard about the dimensions and so forth and what activity had been going on, there was no probable cause to make an arrest, and no matter what happened after that point, whether Schneider was there, whether he ran or didn't run in flight, no matter what was found inside cannot cure his state of mind or cannot make that a valid right if it were not a valid right at the time that he went out to make it.

I say that based upon the facts that we ha[illegible]

here, Judge, there is no probable cause, and I think that is a crucial issue for you to deal with.

THE COURT: Thank you.

Mr. Growman.

MR. GROWNMAN: Your Honor, Iam only speaking because one point was not covered, and that was the trunk of the car that Mr. Schnitzer allegedly owned.

Agent Gonzalez testified that he saw someone putting four cartons into that trunk. Mr. Schnitzer was holding it up and he could only see that they were cartons period, that there was no writing, nothing else, and he saw them in there and closed the trunk.

Subsequent to Mr. Schnitzer's arrest he was asked to give up the key to that car and an agent goes and opens the trunk of the car.

Now there was no one in thecar to drive it away, there was no one going -- if this were contraband in there then there was no one who could have gone away with it.

I have tried to make this as briefly as possible.

THE COURT: Well, assuming that everything up to that point --

MR. GROWMAN: Assuming everything up to that?

THE COURT: Is valid.

MR. GROWMAN: Well, assuming that everythin was

valid, which of course --

THE COURT: Then why couldn't you have had the trunk in this case opened?

MR. GROWMAN: Well, your Honor, in the case of James against Louisiana, which is 34US3131, they were very specific in that, they said when an arrest is made outside of a vehicle and that vehicle is searched, there is a presumption that the principal purpose is to search and that the search is not incident to the arrest.

The Court said that in that case, in such a case the officers should guard the vehicle while obtaining a search warrant.

Your Honor, this vehicle was not going anyplace, the agent had the key to the vehicle, he had no right to open that vehicle up.

This contraband, if it existed, was not going anywhere at all, it could not be driven away, et cetera, Mr. Schnitzer was under arrest, the arrest took place in the building, they didn't see any yellow labels or anything else on these cartons that went in there.

THE COURT: At this point it was virtually a certainty that those were Stanley Tool boxes in that trunk.

MR. GROWMAN: Now, your Honor, the agent testified,

and I believe it was Armstrong, I am not sure which one, he testified -- I may be wrong, it may have been Armstrong, I don't recall which one ofthe agents testified, but someone testified that not only did they go into the trunk and see the four cartons but there was a briefcase in there and --

THE COURT: There is a photograph of it.

MR. GROWMAN: Right.

And he opened it up and took the contents out.

No one had seen any briefcase being put into this car, they just went and did it.

What I am trying to point out to your Honor is that this search was not made incidental to an arrest, this was weigh-in time, maybe a half hour, maybe an hour, whatever, but that search was far away in time, and if the search was valid in the sense that they were looking for cartons, they had no right to look into the contents of the briefcase, which no one saw Mr. Schnitzer or anyone else put into that vehicle.

A search warrant should have been obtained.

THE COURT: All right.

MR. GROWMAN: Thank you, your Honor.

THE COURT: I think we have got two gentlemen whom we haven't heard from yet.

Mr. Schacher?

MR. SCHACHER: I join in every argument made by counsel.

THE COURT: Every word of it?

MR. SCHACHER: Absolutely, sir.

THE COURT: Mr. Bernstein?

MR. BERNSTEIN: I have nothing further to add, your Honor.

THE COURT: Very good.

All right, Mr. Schall.

MR. SCHALL: Your Honor, I find myself in the not unfamiliar position of finding the Government's case being attacked from all sides, both legally and factually.

Now if I might respond just briefly:

On the factual considerations, I will take each attorney as he spoke, and Mr. Sonenshine and Mr. Hochheiser argued vigorously against the credibility of the agents, and I would submit, number one, that the uncontroverted evidence shows, based upon the testimony of the agents, that in fact Mr. Schneider did run from the car into 226 39th Street.

I would like to also look at the same side of this question of credibility, the factual question, the question of the credibility of Mr. Schneider, because he is the one that says that what the agent said happened didn't happen --

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THE COURT: Save your time, I don't believe him.

MR. SCHALL: Well then, I will pass on to just one -- let me just check.

The legal point I want to talk about, the credibility, and I will just mention the legal point raised by Mr. Hochheiser, I believe it was Mr. Hochheiser who said that the agents could not conclude that this was a carton of Stanley Tools in Mr. Schneider's possession, but I would say that the question here is was there probable cause for them to arrest him, and I think that is the way it should be looked at, and I think that the pursuit was entirely proper.

Your Honor, they didn't have to conclude at that time that in fact, necessarily, for certainty that this was a Stanley carton. The question is based on what happened, did they have probable cause to pursue Mr. Schneider, and I submit they did.

THE COURT: They have made considerable comment about the lack of any background to this whole event that took place on September 2, 1975.

Would you comment on that?

MR. SCHALL: I will respond to that in this way, and I think I am not disclosing anything that defense counsel haven't already figured out for themselves:

Obviously the agents did not come to this particular location just out of the clear blue; clearly there was a source of information that brought them to this location. The fact is as I indicated prior to the resumption of testimony on the afternoon of the first day that these surveillance began at a prior location. The decision to pick up the testimony at the point at which we did was for the purpose of protecting the source of the information.

Now if your Honor feels, if it comes to the point, and I am not --

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MR. HOCHHEISER: Your Honor --

MR. GROWMAN: I object to this, it is completely outside the scope, there is no such testimony. There should be comments only on the testimony that occurred in this hearing. Now Mr. Schall is going beyond that point and giving your Honor information which was never brought out in this hearing, and I say that that is wrong.

MR. SCHALL: I am responding to the Court's question, obviously what I say is not evidence.

THE COURT: This hearing was called and all the evidence that is going to be put in is in now, but I will permit Mr. Schall to respond to my question, particularly since it is a point raised by the defendants.

MR. SCHALL: Your Honor, assume at this point that the Court were to deny or to grant the motion to suppress, just for purposes of your Honor's question, I think this is the best way for me to answer it, if at that point the Court were to grant the motion to suppress I would say that my first response would be on what grounds, and if the ground was on a question of, well, factual, then I would then respond, what about the law. Then, if the Court were to grant the motion I would would ask for a recess, and under the authority of the case United States v. Tucker, found at 380, F. 2d, I would consult

with the agents if there would be a willingness on the part of the bureau to present further information with respect to the source in order to be able to make a Draper-type argument.

Now that is my response.

Your Honor, at this particular point I am proceeding, I can only proceed on the basis of the information before the Court, obviously what I say is not evidence and I am saying that simply in response to the Court's presented question, and I wouldn't have said that unless there came a point when the Court had granted the motion, then I would have made the application.

That I hope, that is an answer to the question.

THE COURT: Proceed.

MR. SCHALL: Finally, finally I think, turning to the legal question, the legal question that Mr. Adler raised as to inadvertency, with respect to the lack of advertency which he alleged with respect to the goods in the upstairs portion of the premises, I believe that that question is answered by the cases in footnote 2, on page 10 of the Covernment's memorandum.

Your Honor, the inadvertency requirement is met in a situation where the ag ents are legitimately in the position where they make the observation and where the primary purposes of their being in that

position is not to simply see what they can possibly see there.

(Continued next page)

MR. SCHALL: As I argued previously, the purpose of Agent Armstrong was to secure the building, knowing from the surveillance that there were at least three other individuals inside the premises. And I would answer Mr. Adler's argument by saying that he was -- the inadvertence requirement was met because he had a legitimate purpose for being in the upstairs office other than to see what he could find.

Finally, just responding to Mr. Growman's point about -- no, I am sorry. Mr. Abrams spoke next on the subject of what was in Agent Quigley's mind. As the Court observed at one point in the course of the proceedings, the question here is an objective one. What did the circumstances which presented themselves to the agents give probable cause for them to act?

Assuming for these purposes whether their motives were of the purist, whether they were in between or whether they were of the illest, what we have to judge it on is objectively what the agents saw as they approached.

And, finally, in response to Mr. Growman: Mr. Growman is correct in saying I would submit that the -- we are not -- to the extent that we are not seeking to justify the search of Mr. Schnitzer's trunk

on the basis that this was incident to an arrest. Mr. Schnitzer was arrested inside the premises. And certainly the car was not within his grabable reach. The search, however, stands, and it's a valid search for the reason stated in footnote three on page 11 of the Government's Memorandum of Law. That point, based on what had taken place there, was clearly probable cause for the search of the trunk. And based on the very explicit authority of those cases, it was not necessary for the Government, under those circumstances -- I am specifically referring to Chambers v. Moroni and United States ex rel. Laval for the Government to obtain a warrant before it searched the trunk.

THE COURT: Have I heard everything?

MR. ADLER: For clarification, your Honor, I -- I am not talking about legal argument. But may I approach the Court and ask the Court if that document that I referred to is in the Court's file. These are the items which were received in the upstairs office. If not, I would like to --

MR. SCHALL: I was going to -- I meant to suggest that I have no objection to having -- we can run off a copy and have it marked as a court exhibit.

THE COURT: No objection to that.

MR. ADLER: That is very good.

MR. SCHALL: Probably it's a good idea.

THE COURT: Mark it as Exhibit G of G for George.

THE CLERK: Can I have it?

THE COURT: All right.

The following is my decision on this motion to suppress.

Some of the defendants moved in writing to suppress evidence contained in the warrantless search of the premises 226 39th Street, Brooklyn, at about six p.m. on September 2, 1976.

MR. HOCHHEISER: '75.

THE COURT: '75. Correction.

The remaining defendants have joined orally in those motions, so that all defendants are deemed to have moved for the suppression.

The motion made by Defendant Lemanski to suppress certain statements has been withdrawn.

The hearing was commenced last Thursday, September 23, continued on part of Friday, all of Monday, and until now, which is just before lunch on Tuesday. We are dealing with a warrantless search

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incident to a warrantless arrest.

MR. HOCHHEISER: Excuse me, your Honor. I think you mis-spoke. Today is Wednesday.

THE COURT: Good Lord. Then it's all Monday, Tuesday and into Wednesday. You lose track of time when you're involved in a one-day hearing.

As I said, we are dealing with a warrantless search incident to a warrantless arrest. The evidence sought to be suppressed falls into three groups: cartons which were found basically in the garage portion of the building;

Secondly, the cartons, tools, records which were found in the upstairs office; and

Third, the cartons, briefcase and possibly some other materials which were found in the trunk of Mr. Schnitzer's Oldsmobile.

According to the Government's theory here, there was probable cause for the arrest of Mr. Schneider. Therefore, there was a valid search of the garage area incident to the arrest of Mr. Schneider. Therefore, that search coupled with the knowledge of the presence of other people in the building warranted extension of the transaction to the upper floor which was sufficient probable cause for the arrest of the other

defendants on the second floor.

Consequently, there was probable cause not only for the search of the office, which could also be viewed as an extension of the arrest of Mr. Schneider. There is also probable cause from the ensuing events coupled with the prior event for the search of the trunk of the automobile.

All parties are agreed that if there was no probable cause for Mr. Schneider's arrest, then the entire motion should be granted.

The finding of the Court on the evidence which is before me, which I shall discuss in a moment, is that there was no probable cause for the arrest of Mr. Schneider. Consequently, the motion to suppress is granted.

Now, for the reasons:

In order to have a warrantless arrest, you need two elements: One, you need an officer acting with authority.

Secondly, you need probable cause.

There is no issue here over the authority of the FBI agents who were present.

Probable cause has been defined by the Supreme Court as follows:

"'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' . . . And this 'means less than evidence which would justify condemnation' or conviction . . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

That's from Brinegar against the United States, 338 U.S. at page 175 to 176.

When that concept is applied to the circumstances of this case, I can find no probable cause for Mr. Schneider's arrest. The chief gap that I find in the proof of the Government is the absence pointed out by defense counsel of any evidence as to why this building was selected from all -- over others of the metropolitan area with the target of an eleven-man FBI surveillance covering a period of four hours. Until just a few minutes ago when Mr. Schall said that they had information from an informant

they were trying to protect the identity of the informant, there was not one hint in the proof presented to the Court as to why this operation focused upon No-Name Transportation.

It is obvious to the Court, of course, as it was to everyone else, that somebody had to have a reason for taking the time of all these people to watch for four hours what was going on at this small trucking concern. But what the reason was, was not presented; and the Court may not assume merely that eleven people were involved in this operation that there was probable cause for them being there.

There is no indication of record that there was an informant's tip that this was a known drop for stolen goods. In short, there is nothing to explain why they were there. But for some purpose or based upon the evidence, quotes, mysterious, unquote, reason, all of the agents arrived and spent approximately four hours in the surveilling operation. Five of them testified. None of them, of course, were asked a key question.

I commented earlier that I do not believe the testimony of Mr. Schneider. I have given it no weight in making my decision.

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What troubles me is essentially the arguments which are made and were summarized very completely, I thought, by both Mr. Sonenshine and Mr. Hochheiser. The story given to us by the five FBI agents who testified has too many inconsistencies in it to be acceptable.

Moreover, even assuming the facts as testified to by Agent Quigley, who presented the strongest case, of course, for the Government, we have no more than the knowledge that Stanley tools were stolen in Connecticut; that he thought the truck had been recovered -- it was, in fact, only the tractor -- in Staten Island a few days earlier; that common appearing brown boxes of various shapes, four of them -- three of them -- of one shape and size and one of another had been brought from this building and placed in the trunk of a car. And at that point his testimony here is inconsistent.

On Friday, he testified that there was a radio transmission that there is another box coming out. And at that point, Agent Goode said, "Let's go."

On cross-examination by Mr. Abrams he said it was by him. I believe that was so.

Agent Quigley said, when the car started they

were going with the intent to enter the premises and arrest. I do not agree with Mr. Abrams' argument that intervening subsequent events could not have undone an inadequate probable cause at that point in time. Nevertheless, Quigley testified he started at that point, intending to arrest.

The car moved around the corner. Lots of adjectives and adverbs have been used to describe it. But they did move rapidly. I think one witness said that they reached a speed of forty miles an hour for a distance of about a hundred and fifty feet, which means they not only reached it, but they decelerated to a stop, and advanced on the premises. Simultaneously, cars were advancing from other directions. Quigley changed his testimony later on Monday and said that he made a determination to enter the building after he saw Schneider turn and run and he saw a Stanley toolbox under his arm with a yellow label with black lettering.

Continued next page)

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THE COURT (Con't): Even assuming -- forget what he said on Friday -- assuming the truth of what he said, that Schneider was on the sidewalk and went back in. I do not find that this would provide probable cause, even coupled with what the Government calls flight. The point was made and is well taken that the car was bearing down upon Mr. Schneider. I don't accept from the testimony that was given that he was in any serious danger of being hit. He was too close to his own car. But there were obviously four men in an automobile bearing down on him, hell-bent for election. It was not an identified FBI car. No one was in uniform. It would give any reasonable, produent person pause and cause to get out of there as fast as he could.

Flight under those circumstances cannot reasonably be taken as evidence as guilt. At least not in the context that we have no more information than that we have seen four prior boxes go into a trunk out of this garage, and the person who was fleeing has a box with a yellow label and black lettering under his arm.

I am bothered by more aspects of the FBI story here. Some of the defects and inconsistencies i

Gonzalez's testimony have been pointed out. When he initially testified that he left the scene essentially as Schneider disappeared into the building, I found inherently incredible. FBI agents -- and I understand and realize they are professionals, well-trained. But are they so well-trained and clinical that they can wait for four hours, be essentially the focal man in a transaction and have it all come to one roaring climax with cars convering on the building and walking away and not seeing what happened. I don't believe it. I didn't when he said it, and I certainly don't believe it in view of the subsequent testimony that that is not what he did.

Instead, the camera testimony and the enlargement that followed made it quite obvious that he stayed on there until things had calmed down considerably.

I found the testimony of Agent Armstrong to be particularly convincing. I am not exactly sure why. I guess this is why trial judges are given the discretion of passing on credibility.

In any event, Armstrong made no mention of any transmission about somebody coming out with a boc under his arm. If that transmission was not made, then

obviously the decision to move in was based only upon the four boxes having been put in Mr. Schnitzer's car. The gap there bothers me in trying to determine what precisely did happen.

As a matter of fact, I have no determined what did happen.

Going back to Armstrong, he testified -- and I believe him -- that his car arrived. He did not see Schneider or Quigley. He went in. He said he -- when he went in, he only assumed that Quigley was inside because the FBI car was out in front.

I believe there was someone else who went in after Quigley. But Goode was in the FBI car and Morall was also in the FBI car. Where were they?

Armstrong said there was nobody in the car. There was nobody near it. I asked him that question specifically.

He also said he went immediately into the building. I believe he said he was -- take that out. He went right into the garage area and he went all the way to the back. Agent Morall, who also did the same thing, said he had. He didn't see Armstrong for fifteen minutes. They both can't be correct. They are going into a garage quite reasonably

expecting that they may have serious trouble.

I have great sympathy for the FBI agents or any policeman who goes into a strange building not knowing whether he is going to be met by a barrage or bullets or absolute silence and nothing there. But in the context here of Morall searching the building, looking under the trucks; Armstrong doing apparently the same thing; neither one talking about the other; can't both be true. We have Morall in a building. He's expecting to find somebody with a gun, he said. He's trying not to reveal his location. But on his own testimony he was behind Quigley by less than the time it would take to go up a staircase.

Quigley in the meantime had gone to the middle aisle and down the middle and had leaned under the truck seeing the feet of Schneider, according to his testimony, and then had gone around the truck -- "FBI, you're under arrest."

I am sure he didn't whisper it because the obvious purpose of the statement was to make Schneider submit. If he said it in the context of everyone kind of tiptoeing around this garage to see if there is anybody else in there, Morall would have heard it. Morall said he did not hear anything.

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There are other inconsistencies. I don't need to go into them. I am simply not satisfied that -- I am not satisfied, first, that I have been told the correct story of what happened here. As I said, I don't believe Schneider. I can't say I don't believe all the FBI agents. I assume some of them are telling the truth. But I can't tell which ones and which are not.

The conflict is such that whatever burden the Government in a motion such as this, they have not met it. But I would go one step further.

The facts, even as given by Quigley, do not, in my opinion, amount to probable cause in the absence of any indication as to why this entire operation was taking place. If they did -- if there was probable cause, the consequence would seem to be that if Stanley tools are stolen in Bridgeport and the truck found in Staten Island, that anyone carrying any Stanley toolbox under his arm is liable to arrest. I don't think the rule has gone quite that far.

It is unfortunate -- perhaps many people think so -- that the consequences of all this is exclusion of evidence which would seem to be necessary to the Government's case. Whether or not the exclusionary

rule will remain the law of this country remains to be seen. As of today, however, it is the law by which this Court is bound. And I, therefore, must grant the motion to exclude from the trial of this case all the physical evidence which was seized in the garage upstairs and from the trunk of Mr. Schnitzer.

That is the Court's ruling, one minute of one.

MR. SCHALL: Your Honor, if I might.

THE COURT: Mr. Schall, you said if I were to do that, you had certain counter moves that you anticipated.

MR. SCHALL: Quite frankly, what I am going to have to do at this point -- well, I will say, first of all, based on the motion, the Government is obviously not in a position to proceed to trial at this point, in view of the fact that there will be no evidence to present against the defendants.

At this point, what I am going to do is this: I want to -- we have daily copy on this. And I will be reading it over and examining and consulting on the basis of the Court's decision. And I think the decision which the Government is going to have to make is either to move to re-open the hearing to provide additional information to the Court which would permit

us to meet a Draper-type test; or, failing that, to decide whether or not we are going to appeal. We are going to file a notice of appeal within the appropriate period of time. I will just state I believe there is authority for the proposition under the case which I cited at the end of the argument, United States versus Tucker at 380 Federal Second, for the Government in a position like this to be able to make such a motion. But, quite frankly, I am just going to have to consult with my superiors upstairs and look over it tomorrow when I get the exact transcript of your decision on it. But at this point, I certainly -- obviously, it is clear to everyone I can't proceed to trial. But I am reserving the right at this point to appeal pursuant to 3731.

THE COURT: All right.

THE SCHALL: We have a month to file a notice on that, as I understand it.

THE COURT: I assume that you will keep the defense counsel notified as to what motions you make.

THE SCHALL: You can be sure. I would ask that the -- none of the defendants are in custody at this time. They are all out on an unsecured, personal recognizance bond. I ask that for that period while

the Government makes its determination as to what course we are going to pursue, that there will be continued under the present conditions.

THE COURT: That request is granted.

MR. BERNSTEIN: If I may, that is not correct. I believe as to my client, he, in fact, posted bail. I would have no objection to signing an unsecured personal recognizance bond, but I ask, if the Court please, that to the extent that money is actually posted by my client, that such bail be exonerated, and, instead, my client be given an opportunity to sign an unsecured bond.

MR. SCHALL: Mr. Bernstein is -- I was incorrect. He is correct. In my statement that all of the defendants -- I believe that Mr. Schneider and Mr. Banerman have both -- I have to check. Yes. Mr. Schneider and Mr. Banerman, and I believe Mr. Cioffi, have posted surety bonds. I would ask that in any event the terms of the bail be continued. However, I would be prepared in view of the fact that the defendants have appeared in Court to have a reduction of those terms. I mean, the defendants have appeared in Court, and I wouldn't object to a motion to reduce the bail.

(Continued next page)

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THE COURT: Under the circumstances they would be out of their minds to skip.

MR. BERNSTEIN: I want to add one more footnote. Mr. Schall has further requested the bail limitations imposed on the clients be maintained. I would ask at this time to the extent there are already limitations on their movements that such limitations be lifted in light if your Honor's decision.

MR. SCHALL: I would object to that. I think Mr. Bernstein is referring to the geographical limitations.

MR. BERNSTEIN: That is correct.

MR. SCHALL: I have taken the position is this case with respect to all the defendants that I do not have any objection to them going to some other location for business or some other legitimate purpose just so long as we are told when they are going and when they intend to come back. I would request that the additional bail limitations in terms of geographic movement remain.

THE COURT: I will reduce all the bail arrangements, whatever they may be , to personal recognizance bonds.

With respect to the bail limits I will continue them as they have been previously established on the representation by Mr. Schall of the consent they will be given in the event a hardship is created in some way. Application can be made to the Court.

MR. BERNSTEIN: May I ask simply this of the Court? My client and I believe one other in his position in the event my client wishes to leave the geographical bail limitations that in the absence of any objections from Mr. Schall such arrangements can be worked out by a telephone call from me to Mr. Schall for that purpose.

MR. SCHALL: I have no objections to that your Honor.

MR. BERNSTEIN: Without my having to trouble your Honor.

MR. SCHACHER: What is our status right now? Are we considered still on trial here?

MR. SCHALL: I wouldn't thing so.

THE COURT: For what purpose?

MR. ABRAMS: Avoiding another trial I assume.

MR. SCHACHER: That is correct.

THE COURT: I would say no, we are adjourned until Mr. Schall takes some action.

MR. SCHALL: I have to act.

THE COURT: If he does not appeal within 30 days then I assume somebody is going to move to dismiss the indictment.

MR. SCHACHER: That is right.

THE COURT: If he is going to make an application to me I will assume it will be made within 30 days, in

fact I will direct it be made within 30 days.

MR. SCHALL: I understand I have to take action either affirmatively or determine that I am not going to act within 30 days from today.

MR. SCHACHER: Thank you your Honor.

MR. HOCHHEISER: May I say, Judge, may I make a humble remark, I have never had a Court that paid more careful attention and spent more energy on such a matter as did this Court. I really do appreciate it, Judge. I will not say thank you for your decision, that would be wrong.

MR. SONENSHINE: I wish to say I join in Mr. Hochheiser's statement.

(Whereupon at 1:10 o'clock P.M. the Court was adjourned.)

* * * * * * * * * * * * *

TRP:AAS:sr
F.# 753372

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

HERMAN BANERMAN,
VINCENT F. CIOFFI,
KENNETH R. LEMANSKI,
FRANK P. MENGRONE,
ERNEST L. MONTEVECCHI,
ARNOLD SCHNEIDER and
JOSEPH SCHNITZER,

Defendants.

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NOTICE OF MOTION

75 CR 945

PLEASE TAKE NOTICE that upon the annexed affidavit of ALVIN A. SCHALL, Assistant United States Attorney for the Eastern District of New York, duly sworn to the 22nd day of October, 1976, and upon the annexed memorandum of law and upon all the proceedings had and papers filed herein, a motion will be made and submitted to the Honorable George C. Pratt, United States District Judge for the Eastern District of New York, at 9:00 A.M. on November 5, 1976, or as soon thereafter as counsel can be heard, at 225 Cadman Plaza East, Brooklyn, New York, for (i) leave to reopen the hearing on the motion to suppress in the above-captioned case, for (ii) reconsideration, on the basis of additional evidence to be presented at said reopened hearing, of the order of this Court on September 29, 1976, granting the motion to suppress and for (iii) such further relief as this Court may deem just and proper.

Dated: Brooklyn, New York
October 22, 1976

Yours etc.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for the United States
of America
225 Cadman Plaza East
Brooklyn, New York 11201

By: Alvin A. Schall
Alvin A. Schall
Assistant U.S. Attorney

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TO:

Carl D. Bernstein, Esq.
Kronen & Bernstein
485 Madison Avenue
New York, New York

Aaron Schacher, Esq.
32 Court Street
Brooklyn, New York

Lawrence Hochheiser, Esq.
Hochheiser & Cohen
Suite 1804
16 Court Street
Brooklyn, New York

Frederick Abrams, Esq.
250 Broadway
New York, New York

Gustave H. Newman, Esq.
522 Fifth Avenue
New York, New York

William Sonenshine, Esq.
Evseroff & Sonenshine
186 Joralemon Street
Brooklyn, New York

Emanuel Growman, Esq.
176-60 Union Turnpike
Flushing, New York 11366

TRP:AAS:sr
F.# 753372

A 179

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

HERMAN BANERMAN,
VINCENT F. CIOFFI,
KENNETH R. LEMANSKI,
FRANK P. MENGRONE,
ERNEST L. MONTEVECCHI,
ARNOLD SCHNEIDER and
JOSEPH SCHNITZER,

Defendants.

AFFIDAVIT

75 CR 945

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STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

ALVIN A. SCHALL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such and charged with the prosecution of the above-captioned case. I make this affidavit in support of the Government's motion for (i) leave to reopen the hearing on the motion to suppress in the above-captioned case, for (ii) reconsideration, on the basis of additional evidence to be presented at said reopened hearing, of the order of this Court on September 29, 1976, granting the motion to suppress and for (iii) such further relief as this Court may deem just and proper.

2. It is the intention of the Government to move before this Court for leave to reopen the hearing on the motion to suppress, so that the Government can present additional evidence to establish probable cause for the arrest of Arnold Schneider on September 2, 1975. It is also the intention of the Government to ask this Court (i) on the basis of said additional evidence, to reconsider its ruling of September 29, 1976, granting the motion to suppress and for (ii) such further relief as this Court may deem just and proper.

3. The annexed memorandum of law is submitted in

support of the above-described motion.

WHEREFORE, your deponent respectfully requests that (i) leave be granted for the Government to reopen the hearing on the motion to suppress in the above-captioned case, that (ii) this Court reconsider, on the basis of additional evidence to be presented at said hearing, its order of September 29, 1976, granting the motion to suppress and that (iii) this Court grant such further relief as it may deem just and proper.

Alvin A. Schall
Alvin A. Schall
Assistant U.S. Attorney

Sworn to before me this
26th day of October 1976.

[illegible] New York
Qual.
Term [illegible] 9 77

TRP:AAS:sm
F. #753,372

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

- against -

HERMAN BANERMAN,
VINCENT F. CIOFFI,
KENNETH R. LEMANSKI,
FRANK P. MENGRONE,
ERNEST L. MONTEVECCHI,
ARNOLD SCHNEIDER and
JOSEPH SCHNITZER,

Defendants.

75 CR 945

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GOVERNMENT'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO REOPEN
SUPPRESSION HEARING

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201.

ALVIN A. SCHALL,
Assistant U.S. Attorney,
(Of Counsel).

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PRELIMINARY STATEMENT

Count One of indictment 75 CR 945 charges defendants Herman Banerman, Vincent F. Cioffi, Kenneth R. Lemanski, Frank P. Mengrone, Ernest L. Montevecchi, Arnold Schneider and Joseph Schnitzer with unlawful possession, on September 2, 1975, of a quantity of stolen Stanley brand hand tools, in violation of Title 18, United States Code, Sections 659 and 2. Count Two of the indictment alleges that on September 2, 1975, the seven defendants conspired to possess the stolen goods, in violation of Title 18, United States Code, Section 371.

The stolen tools were recovered by agents of the Federal Bureau of Investigation ("FBI") in the course of a warrantless search of the premises at 226 39th Street in Brooklyn, New York, on September 2, 1975. After indictment, defendants moved to suppress the seized tools as well as other items of evidence recovered at the premises. In opposition to the motion to suppress, the Government argued that the Stanley tools in the garage came into the "plain view" of FBI agents who were in hot pursuit of defendant Arnold Schneider as he fled from the sidewalk into 226 39th Street.

On September 29, 1976, following a four day suppression hearing, the Court granted the motion to suppress, finding that the Government had not established probable cause for the arrest of defendant Schneider (964).[1/] This memorandum of law is submitted in support of the Government's motion to reopen the suppression hearing.

1/ References are to pages of the transcript of the suppression hearing held on September 23, 24, 27, 28 and 29, 1976.

STATEMENT OF FACTS

Testimony at the suppression hearing revealed that between approximately 2:00 P.M. and 5:45 P.M. on the afternoon of September 2, 1975, an FBI surveillance was conducted of the premises at 226 39th Street in Brooklyn, New York. This surveillance was part of an investigation into the theft of a quantity of Stanley tools in Bridgeport, Connecticut on August 26, 1975.

At approximately 2:15 P.M., surveilling agents observed the arrival of a green Oldsmobile and an 18 foot straight truck bearing the letters "RVD" (the "RVD" truck) outside the premises. The Oldsmobile was driven by defendant Joseph Schnitzer, the straight truck by defendant Kenneth R. Lemanski (23-24). After parking the vehicles they were driving, Schnitzer and Lemanski both entered 226 39th Street (24). Shortly thereafter, Lemanski drove a maroon Mack tractor from the garage portion of the building and parked it in front of the RVD truck. He then re-entered 226 39th Street (25).

A 20 foot straight truck, with yellow cab and silver box, was then observed to exit the garage, cab first, make a U-turn and then pull back into the garage, still cab first (31). Shortly thereafter, Lemanski and defendant Arnold Schneider were seen to approach the RVD truck and to work together making repairs on it (31-32). Lemanski and Schneider then returned to the garage (34).

At approximately 3:10 P.M. defendant Montevecchi arrived and entered the building (33-34). Subsequently, Lemanski and Montevecchi were observed together outside apparently making repairs on the RVD truck (34). Montevecchi was then observed to enter the RVD truck and back it into the garage (39). Subsequently, the maroon tractor was also moved into the building (39).

A few minutes later Joseph Schnitzer exited the garage, reparked his car near the pedestrian entrance to 226 39th Street and then re-entered the premises (39).

At approximately 5:20 P.M., Schnitzer exited 226 39th Street again, walked to the parked Oldsmobile and then backed the vehicle to a position directly in front of the

open pedestrian door of the building (48-49). Almost simultaneously, a male individual wearing a white "tee" shirt and blue pants exited the garage carrying two cartons which he placed in Schnitzer's car. While Schnitzer adjusted the cartons, the aforementioned individual returned to the building and brought out two more cartons which were also placed in the car (48-49). Schnitzer and this individual then re-entered 226 39th Street. At about 5:25 P.M., Schnitzer's "tee"-shirted helper exited the building and departed the area (53-54).

At about 5:45 P.M., defendant Schneider exited 226 39th Street, entered a gray Cadillac which was parked across the street and moved the car to directly behind Schnitzer's green Oldsmobile (54). After parking the car, Schneider opened the trunk and entered the pedestrian door of the garage (54).

Special Agent Walter Quigley testified that on the afternoon of September 2, 1975, he was in the vicinity of 39th Street and 3rd Avenue assisting in the surveillance and receiving transmissions as to the activity at 226 39th Street (205, 208-209). As the surveillance

progressed, Quigley, as were the other agents, was furnished with information concerning the goods on the stolen shipment. He was advised that they were Stanley brand hand tools contained in brown cardboard cartons with yellow labels with black lettering (207). Information was also transmitted to the agents concerning the dimensions of cartons on the shipment (207). Quigley was also told that the "truck" which had been carrying the shipment, and which had been stolen along with the tools, had been recovered on Staten Island (206).[2/]

Sometime after 5:15 P.M., Quigley and the agents who were with him in the car on 3rd Avenue were advised of cartons being taken from 226 39th Street and placed in the trunk of a car parked outside the building (210). Upon receiving this information, the agents drove from 3rd Avenue and approached the premises at 226 39th Street (211). Agent Quigley testified that when he drove up, he observed defendant Schneider at the rear of the gray Caddillac (212). Upon seeing the agents, Schneider turned and fled

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2/ Agent Quigley was told that the "truck" had been found. It was later determined that it was only the tractor which had been recovered on Staten Island prior to the arrest of the defendants (966).

into the building, at which point Quigley observed Schneider to be carrying a cardboard carton bearing a yellow label with black lettering (213-214). Quigley testified that he then pursued Schneider into 226 39th Street and arrested him in the garage portion of the premises (215, 217, 222-223).

The foregoing constitutes a brief summary of the events leading up to the arrest of defendant Schneider. If leave to reopen the suppresssion hearing is granted, it is expected that testimony will establish the following additional facts.

Early on the afternoon of September 2, 1975, Special Agent Al Garber of the FBI received a telephone call from a previously reliable informant. Over the telephone, the informant told Garber that a truck belonging to individuals who would be purchashing the stolen Stanley tools would be in the vicinity of Washington Street near Atlantic Avenue in Brooklyn at approximately 1:00 P.M. that same day, which truck, the agents were aware, had the letters RVD on it. From Washington Street, the informant stated, the truck would be driven to where the stolen tools were located to be loaded. The informant advised, however, that he did not know the address to which the truck would be going to pick up the tools. It would thus be necessary for the agents to follow the truck from Washington Street to the "drop."

Responding to this telephone call, FBI agents proceeded to the vicinity of Washington Street and Atlantic Avenue, just in time to observe a dark Green Oldsmobile leading the RVD truck from Washington Street to Atlantic Avenue and in a westerly direction on Atlantic Avenue. The Oldsmobile and the truck were then surveilled to the Brooklyn Queens Expressway and followed on the BQE to the 39th Street exit. At approximately 2:00 P.M., as testimony at the suppression hearing revealed, the two vehicles entered 39th Street and parked in front of the No Name Transportation Company.

The Government does not intend to either call the informant as a witness or to disclose his identity.

ARGUMENT

POINT 1

THE GOVERNMENT SHOULD BE GRANTED LEAVE TO REOPEN THE SUPPRESSION HEARING.

As noted above, the Court granted the motion to suppress on the grounds that the Government had failed to establish probable cause for the arrest of defendant Schneider (963). The Court stated that in its view the "chief gap" in the proof of the Government at the suppression hearing was "the absence of... any evidence as to why" the premises at 226 39th Street were placed under surveillance (964).[3/]

3/ The Court also stated that because of inconsistencies in the testimony of the agents it did not believe it had been given an accurate picture of exactly what happened at 226 39th Street on the afternoon of September 2, 1975 (966, 972).

Defendant Schneider testified that he never exited 226 39th Street after he parked the gray Cadillac, opened the trunk and entered the building (702-703). The Court, however, said that it did not believe Schneider's testimony, and consequently gave it no weight in the decision (965).

In any event, the Government is prepared to present additional testimony concerning the flight of Schneider into the building.

The Government is asking for leave to reopen the suppression hearing so that it can close the "gap" in its proof. It intends to do this through the testimony of Special Agent Garber as to what he was told by the informant (as outlined above) and also through additional surveillance evidence (the following of the Oldsmobile and the RVD truck to 226 39th Street). We respectfully submit that, as a proper exercise of the Court's discretion, the Government should be granted leave to reopen the suppression hearing to present additional evidence to establish probable cause for the arrest of defendant Schneider. United States v. Tucker, 380 F.2d 206 (2d Cir. 1967).[4/]

4/ United States v. Tucker was an appeal, after a jury trial, of a conviction for violation of the narcotics laws. One of the arguments raised by appellant was the claim that, contrary to the finding of the district court, testimony at a pre-trial suppression hearing had failed to establish probable cause for his arrest (pursuant to which narcotics were discovered on his person). Appellant Tucker also argued that at the suppression hearing the Government should have been compelled to disclose the identity of the informant who provided information which served as part of the probable cause for his (Tucker's) arrest. (Footnote continued on next page).

4/ Footnote continued

The Court of Appeals found, however, that there was probable cause for Tucker's arrest and that it was not error for the district court to refuse to compel the Government to disclose the identity of the informant (see Point II, infra). It thus affirmed the conviction. Moreover, in its opinion, the court gave its approval to the procedure in a suppression hearing whereby the prosecution proceeds without disclosing the identity of its informant and is then permitted to reconsider its decision not to disclose and to reopen the hearing with disclosure if the trial court finds that the burden of establishing probable cause has not been met. 380 F.2d at 213-214.

Clearly the authority of United States v. Tucker is controlling here. At the suppression hearing in September the failure of the Government to present any testimony concerning the informant's information was based on the desire to protect the identity of the informant. It was believed that testimony as to the surveillance would establish probable cause for Schneider's arrest. However, now that the Court has found that there was not such probable cause, the Government is seeking, as contemplated by Tucker, an opportunity to bring forth additional evidence to establish the legality of the arrest. See also United States v. Comissiong, 429 F.2d 834, 839 n.8 (2d Cir. 1970).

POINT II

THE ADDITIONAL EVIDENCE ESTABLISHES PROBABLE CAUSE FOR THE ARREST OF DEFENDANT SCHNEIDER, AND IT IS NOT NECESSARY TO DISCLOSE THE IDENTITY OF THE INFORMANT.

Assuming arguendo that the Court grants leave to the Government to reopen the suppression hearing, we submit that the additional evidence which will be presented clearly establishes that there was probable cause for the arrest of defendant Schneider. We further submit that the facts of the case are such that the Government should not be required to disclose the identity of the informant.

I

The analysis must, necessarily, begin with a definition of probable cause. "Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-176 (1949). And in this connection, it is not necessary that officers know of facts sufficient to

negate all possible lawful explanations for a suspect's actions. United States v. Rodriguez, 532 F.2d 834, 838 (2d Cir. 1976).

The concept of probable cause set forth in Brinegar was applied in Draper v. United States, 358 U.S. 307 (1959). The facts in Draper can be briefly stated. On September 3, 1956, federal agents in Denver, Colorado, were told by an informant that Draper was selling narcotics to local addicts. Four days later, on September 7th, the informant advised that Draper had gone to Chicago on September 6th and that he would be returning to Denver with narcotics, arriving by train either on the morning of September 8th or 9th. The informant gave a detailed physical description of Draper and of the clothing that he would be wearing. He also stated that he would be carrying 'a tan zipper bag' and that he habitually 'walked real fast.' 358 U.S. at 309.

On the morning of September 9th, agents went to the Denver Union Station and kept watch on all incoming trains from Chicago. While at the station, the agents

observed an individual having the same physical attributes and wearing the same clothing described by the informant alight from an incoming Chicago train and walk rapidly toward the exit. He was carrying a tan zipper bag and was wearing a raincoat, as previously described by the informant. The agents then stopped the man, later identified as Draper, and arrested him. Upon searching Draper, the agents found in his possession two envelopes containing herion. 358 U.S. at 390-310.

After analyzing the facts of the case, the Supreme Court held that there was probable cause for Draper's arrest. The Court pointed out that upon seeing Draper walk rapidly towards the station exit, the agents "had personally verified" every bit of the informant's information, except the statement that Draper was carrying narcotics. There was thus 'reasonable grounds' to believe that Draper would have the heroin with him. 358 U.S. at 313.

With Draper as a starting point, attention can be directed to Second Circuit cases which have focused on the question of probable cause for an arrest where there is "verified" informant's information.

In United States v. Comissiong, 429 F.2d 834 (2d Cir. 1970), a reliable informant told federal narcotics agents that Comissiong, whom the informant only knew as "Lefty", had been convicted six years before for a federal narcotics violation and that Comissiong owned a 1967 Oldsmobile. The informant also gave the license number of the vehicle. In addition, the informant described Comissiong's present method of operation. He disclosed that Comissiong would go to a given address, take orders for narcotics, depart in the company of a female, drive to another address, leave the female in the car, go inside the building and get the narcotics and then return to the car and give the narcotics to the female, believing that she would never be searched. After receiving this information, the agents verified the car registration and the arrest record. Thereafter, on January 3, 1968, the informant told the agents that Comissiong would be doing business that night in the usual manner. 429 F.2d at 835.

That evening Comissiong was observed going through the ritual described by the informant. After he exited the second address and was seen to place a cellophane package in his pocket, he was arrested as he approached his car. On Comissiong's person the agents found a package containing 64 grams of heroin. id.

The Court of Appeals held that the combination of the informant's information and the testimony of the agents established probable casue for Comissiong's arrest. Writing for the panel which decided the case, Judge Friendly pointed out that "the detailed scenario" described by the informant "and its fulfillment" placed the case in the category of Draper v. United States, supra. 429 F.2d at 836.

Just over a year after Comissiong came United States v. Manning, 448 F.2d 992 (2d Cir.) (en banc), cert. denied, 404 U.S. 995 (1971), the facts of which were as follows.

Approximately two weeks before the attempted arrest in question, a previously unknown informant told federal agents that Manning was dealing in heroin and cocaine. The informant gave Manning's address, the make and license number of his car, and the address of his girl friend, Audrey Abbot. The informant also identified Manning's picture.

Thereafter, the agents, who knew of Manning as a "major violator," confirmed Manning's ownership of the car and observed the car at both his and Audrey's addresses, the latter of which the informant had said Manning used as a base of operations. 448 F.2d at 993-994.

On October 8, 1968, the informant advised the agents that Manning was on his way to Audrey's apartment with narcotics. The informant was told to go to the apartment and to telephone if Manning arrived with the drugs. In the meantime, the agents went to the apartment and observed Audrey's car parked outside. Shortly, they were told that the informant had called in and said that the narcotics were in the apartment. Armed with this additional information, the agents proceeded to the door of the Abbot apartment and announced their presence. Upon hearing running inside, they kicked the door down and entered the apartment. Although Manning eluded the agents via the fire escape, the agents discovered in the apartment a quantity of heroin and cocaine, along with narcotics paraphernalia. 448 F.2d at 994.

At his trial - Manning surrendered one week after the search - Manning moved to suppress the narcotics

found in the Abbot apartment. The motion was denied. Manning was convicted, and he appealed, claiming that there was not probable cause for his attempted arrest on October 8th.

In an en banc decision, the Court of Appeals held that there was probable cause for the entry into the Abbot apartment, thus reversing a 2-1 panel decision which had overturned the conviction. Writing for the Court of Appeals, Judge Friendly determined that the combination of (i) corroborated informant's information (Manning's ownership of the car, the observation of the car outside the Abbot apartment and the identification of Manning's photograph), (ii) seeing Manning's car outside the apartment when the informant said a narcotics transaction was about to take place and (iii) the informant's statement that narcotics were in the apartment, coupled with hearing running inside the apartment clearly constituted probable cause for the attempted arrest. 448 F.2d at 998-999. In his opinion, Judge Friendly cautioned against treating each fact in a probable cause equation "in isolation," noting that the evidence is always to be considered as a whole. 448 F.2d at 999. He also placed particular

emphasis on the fact that the agents heard running and scuffling when they approached the door of the Abbot apartment. id.[5/]

In United States v. Carneglia, 468 F.2d 1084 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973), the Court of Appeals was faced with the question of whether or not there was probable cause for the F.B.I. to stop and search a truck believed to be carrying stolen goods. The facts were essentially as follows:

On June 25, 1971 a tractor-trailer carrying 414 rolls of doubleknit piece goods was hijacked shortly after its departure from Kennedy Airport en route to Dover, New Jersey. Following the hijacking, a reliable informant told

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5/ The Court's recognition of flight as an important factor in the determination of probable cause is highlighted by its quotation from Chief Justice Warren's opinion in Peters v. New York, 392 U.S. 40, 66-67 (1968):

> [D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest."

the FBI, based on personal knowledge, that the stolen merchandise was on two "Hub" rental trucks. He told where the trucks were located, and he gave the numbers of the vehicles. Acting on this information, the agents placed two "Hub" rental trucks in Brooklyn under surveillance. One of the trucks was parked in a service station; the other was a short distance away in a vacant lot. On the morning of July 9, 1971, Carneglia and one of his co-defendants were seen to approach the first truck (located in the service station), engage in some activity around it and then depart from the area in a Cadillac accompanied by a third defendant. The Cadillac then approached the second truck, and Carneglia and the same co-defendant (DeVito) were seen to spend several minutes in the vicinity of the vehicle. Carneglia and DeVito then returned to the Cadillac and drove with defendant Russo back to the first truck. Shortly thereafter, the first truck was seen to depart the service station driven by a fourth defendant in the case, one Inzerillo. Agents proceeded to stop the truck a few blocks away on Atlantic Avenue and

then return it to the service station. At the service station the truck was opened and searched, and inside were found goods from the stolen shipment. A warrant was then obtained for the second vehicle, and inside it were found more of the stolen goods. 468 F.2d at 1086-1087, 1088.

The Court of Appeals determined that there was probable cause for the search of the first truck. The agents testified that Carneglia and DeVito were known to them to be hijackers. This fact, combined with the informant's information, the observations of the agents and the inability of DeVito to explain why he was driving the truck or to produce rental or shipping documents "tended to establish facts and circumstances which would reasonably have warranted 'the officers conducting the search . . . to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search.'" 468 F.2d at 1089.

We submit that here there was clearly probable cause for the arrest of defendant Schneider. As in Draper, Comissiong, Manning and Carneglia, the informant information was substantially supplemented and corroborated by subsequent events. As noted above, the informant stated that the

RVD truck would be leaving an address in Brooklyn in the vicinity of Washington Street and Atlantic Avenue and proceeding to the location where the stolen Stanley tools were located. There, the truck was to be loaded with the tools. After proceeding to Brooklyn, the agents observed the Oldsmobile and the RVD truck proceeding in a westerly direction on Atlantic Avenue. After travelling for a time on the Brooklyn Queens Expressway, the two vehicles exited at 39th Street where repair work of some kind was apparently done on the RVD truck (thus giving grounds for the inference that further use of the truck was contemplated: i.e., taking the stolen tools to the purchasers, United States v. Carneglia, supra, 468 F.2d at 1087). Further confirmation of what the informant had said was then provided by the U turn exit and re-entry of the yellow truck and the backing of the RVD

truck into the building, for from these movements it would be reasonable to conclude that the two vehicles were being positioned so as to facilitate a transfer from one to the other. Later in the afternoon brown cardboard cartons (the agents knew by now that goods on the stolen shipment had been in brown cardboard cartons, and they had been advised of the recovery of the "truck" on Staten Island) were seen being placed into the trunk of the green Oldsmobile which had led the RVD truck down Atlantic Avenue, onto the BQE and then to 226 39th Street. Then, at close to six o'clock, defendant Schneider exited 226 39th Street carrying a carton bearing the bright yellow label with black lettering which the FBI had been told about. And at the approach of the agents he fled back into the building.

We submit that the combination of (i) the informant's information, (ii) the afternoon's surveillance (which disclosed events no less verifying in nature than those in Draper and Carneglia), (iii) Schneider's flight, United States v. Manning supra, 448 F.2d at 999, and (iv) the knowledge of the recovery of the "truck" on Staten Island was clearly more than sufficient to warrant "the belief" that "an offense [was] being committed." There was thus probable cause for Schneider's arrest.

II

The Government does not intend to either call the informant as a witness or to disclose his identity. This portion of our memorandum is addressed to the anticipated request of the defense for such disclosure.

The question of whether or not the identity of an informant should be disclosed in a pre-trial suppression hearing has been considered on a number of occasions in the Second Circuit. In United States v. Tucker, Supra, 380 F.2d 206, the Court adopted the rule that, even in the case of a warrantless arrest, disclosure of the informant's identity would be required only when the informant's story constituted "'the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause," 380 F.2d at 212.

In United States v. Comissiong, supra, 429 F.2d 834, the defendants argued that it was error for the trial court to refuse to compel the Government to disclose the identity of its informant. The Court of Appeals rejected the claim, pointing out that as in United States v. Tucker, "material other than the hearsay information"

'went most if not all of the way toward justifying the arrest...'" of Commissiong, 429 F.2d at 838. The Court also gave additional approval to Tucker:

> "While the matter is thus settled in this circuit, we add that in our view Tucker strikes a proper balance between the desire to afford a fair opportunity to challenge police conduct [(fabrication of an informant, United States v. Tucker, 380 F.2d at 212)] and the need for protecting informers not merely to maintain sources of information, particularly in regard to organized crime, but often to guard against bodily harm to them and their families. The independent evidence, even though not adequate of itself to establish probable cause, constitutes a sufficient voucher against fabrication [(of the existence of an informant)], although obviously not a complete one. 429 F.2d 839."

We respectfully submit that application of the Tucker - Comissiong "main bulk" and "sufficient voucher against fabrication" standards to the facts of this case clearly demonstrates that disclosure of the identity of the Stanley tool informant is not required. The previous recovery of the stolen tractor on Staten Island, the observation of

the RVD truck proceeding westward on Atlantic Avenue, the stopping of the truck at 226 39th Street, the making of repairs, the repositioning of vehicles and the backing of the RVD truck into the garage all served to provide corroboration of what the informant had said. Then, late in the afternoon, defendant Schnitzer, who had led the truck to the garage, moved his vehicle and, with the assistance of his "tee"-shirted companion, placed brown cardboard cartons in his Oldsmobile. Thereafter, whatever may still have been "lacking in the scales," United States v. Manning, supra, at 998, to verify the informant's information was provided when defendant Schneider, carrying the brown cardboard carton with the yellow label and black lettering, fled back into the building at the approach of the agents. The independent evidence in this case clearly rises to at least the same level as that found sufficient in Comissiong, Manning and Carneglia, thus obviating any necessity for disclosure of the identity of the informant.

POINT III

DEFENDANTS BANERMAN, CIOFFI, LEMANSKI, MENGRONE AND SCHNITZER HAVE FAILED TO ESTABLISH THEIR STANDING TO CONTEST THE LEGALITY OF THE ENTRY INTO THE GARAGE AT 226 39TH STREET.

Testimony at the suppression hearing revealed that, at the time of the alleged illegal search of the garage, the defendants Banerman, Cioffi, Lemanski, Mengrone, Montevecchi, and Schnitzer were not present but were instead on the second floor of the building, a separate and distinct part of the premises known as 226 39th Street (571-572). These arrests followed the arrest of defendant Schneider in the garage of the building (568-570). It continues to be our theory that the arrests on the second floor office and the seizure of evidence there followed properly from the arrest of Schneider and the seizure of the tools in the garage. See Memorandum of Law in Opposition to Motion to Suppress, 10-11. We believe, however, that the record does not show that the entry into the garage, if illegal, violated the Fourth Amendment rights of

the defendants Banerman, Cioffi, Lemanski, Mengrone and Schnitzer.[6/]

Normally, it is required of one "who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." Jones v. United States, 362 U.S. 257, 261 (1962), emphasis added. We believe that on the present record defendants Banerman, Cioffi, Lemanski, Mengrone and Schnitzer (hereinafter the "defendants") have not yet established that any of their privacy rights were violated by

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6/ At the suppression hearing, it was conceded that "all defendants" had "standing to contest the validity of the search and seizure inside the premises at 226 39th Street." (881). Whether a defendant has standing to question the legality of a search is a question of law, however, and a concession on a question of law is not binding on the court. United States v. Tortorello, 533 F. 2d 809, 812 (2d Cir. 1976). Accordingly, we are free to raise the question of standing at this time.

We do not contest the standing of defendants Montevecchi and Schneider to challenge the legality of the entry into the garage. Defendant Schneider was in the garage when he was arrested by Agent Quigley. Moreover, because of the relationship of both defendants to the premises at 226 39th Street, the search of the garage, if illegal, violated their privacy. Mancusi v. DeForte, 392 U.S. 364, 368 (1968).

the entry into the garage. Until they do so, they cannot challenge the legality of the entry into the upstairs office on the basis of any argument predicated on the illegality of the garage search. Or, put another way, since the defendants have not shown "standing to contest the legality of the garage search, the information obtained from that search was not illegally obtained as far as [they are] concerned." United States v. Tortorello, 533 F. 2d 809, 815 (2d Cir. 1976).

The defendants have thus far failed to file any affidavits or to testify with respect to their standing vis-a-vis the garage. The evidence merely shows that on September 2nd they were arrested on the second floor premises at 226 39th Street. This was in a part of the building separate and distinct from the garage on the ground floor. Clearly, defendants' rights of privacy were not violated. While it is true that the privacy of an individual who is present during an illegal search and seizure is violated, here the defendants were not present in the garage. As far as the record shows,

their privacy was not violated any more than the privacy of strangers walking on the street. See Northern v. United States, 455 F. 2d 427 (9th Cir. 1972); Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Review Commission, 519 F. 2d 1257 (3rd Cir. 1975).[7/]

We recognize that the automatic standing rule announced in Jones v. United States, supra, affords automatic standing where the defendant is charged with a possessory offense, and the possession alleged in the indictment occurred at the same time as the search.

Although the automatic standing rule is still the law of this Circuit, we believe that it is no longer valid. As was observed by Judge Oakes in United States v. Pui Kan Lam, 483 F. 2d 1202, 1205 n. 4 (2d Cir.) cert. denied, 415 U.S. 984 (1973), the automatic standing doctrine announced in Jones "has been questioned" in Brown v. United States, supra, and is

7/ We note in passing that any "property interest" in the stolen tools on the part of the defendants would be "totally illegitimate," Brown v. United States, 411 U.S. 223, 229 n. 4 (1973), and thus insufficient for purpose of conferring standing.

of "dubious validity." The dilemma which gave rise to the Jones decision has been resolved by Simmons v. United States, 390 U.S. 377 (1968). No longer is a defendant faced with the Hobson's choice of sacrificing his Fifth Amendment privilege against self-incrimination (by testifying at a suppression hearing to demonstrate his standing) in order to vindicate his Fourth Amendment rights. Moreover, in United States v. Delguyd and Maimone, which was decided on September 29, 1976, the Court of Appeals for the Sixth Circuit affirmed its prior rejection of the automatic standing rule of Jones. See also United States v. Dye, 508 F. 2d 1226, 1232-34 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975).

Even assuming the continued validity of the automatic standing rule, it is clear that for the defendants to succeed in their efforts to establish the requisite standing to challenge the garage search, they must show under Brown v. United States, supra, that possession of the tools at the time of the contested search and seizure is an essential element of the crimes charged in the indictment. See United States v. Capra, 501 F. 2d 267,

272 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975); United States v. Hearn, 496 F. 2d 236, 240-241 (6th Cir.), cert. denied, 419 U.S. 1048 (1974). Here, the defendants are charged with possession of stolen goods (18 U.S.C. §§659 and 2) and conspiracy (18 U.S.C. §371). Decisional authority abounds to the effect that, though the substantive offense may be a possessory crime, conspiracy is not. See, e.g., United States v. Valencia, 492 F. 2d 1071 (9th Cir. 1974); United States v. Hutchinson, 488 F. 2d 484 (8th Cir. 1973), cert. denied sub. nom. Enis v. United States, 417 U.S. 915 (1974); United States v. Sullivan, 488 F. 2d 138 (5th Cir. 1973); United States v. Hearn, supra; United States v. Dye, supra; and United States v. Sacco, 436 F. 2d 780 (2d Cir.), cert. denied, 404 U.S. 834 (1971). Similarly, one may be guilty as an aider and abettor if he merely seeks by his actions to make the criminal venture succeed, United States v. Johnson, 513 F. 2d 819 (2d Cir. 1975). In the case of a crime such as the one charged here, a defendant does not himself have to have been found in possession of stolen goods

in order to be guilty; it is enough that he assist another in his illegal possession. The evidence at trial will show the defendants in the roles of aiders and abettors and co-conspirators. Thus, they do not satisfy the essential element requirement established in Brown for automatic standing under Jones.

CONCLUSION

The motion to reopen the suppression hearing should be granted, and, based upon the additional testimony, the motion to suppress should be denied in all respects.

Dated: Brooklyn, New York
October 26, 1976

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

ALVIN A. SCHALL
Assistant U.S. Attorney,
(Of Counsel).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

HERMAN BANNERMAN, et. al.,

Defendants.

AFFIDAVIT
75 CR 945

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STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

ROGER BENNET ADLER, being duly sworn on oath, deposes and says:

I am associated with GUSTAVE H. NEWMAN, attorney for the defendant ERNEST L. MONTEVECCHI, and as such am fully familiar with the facts and circumstances surrounding this case.

I submit this Affidavit in opposition to a motion by the Government dated October 22, 1976 but not received by your deponent until October 26, 1976 seeking leave of the Court to reopen the hearing held in conjunction with the defendant's motion to suppress a quantity of "Stanley" tools and related business records of the "No Name Transportation Company" and for reargument of this Court's decision granting the defendant's motion to suppress.

The Government's claimed need in moving for leave to reopen the suppression hearing is to permit the proferring of hearsay testimony from special F.B.I. agent Garber relative to certain information supplied by an alleged confidential informant which, when coupled with claimed observations of a truck with the mark-

ings "RVD" and a green Oldsmobile commencing in the vicinity of Washington Street and Atlantic Avenue and continuing through the arrival of the truck and car at the No Name Transportation Co. (see: pp. 7-8 of the Government's Memorandum of Law dated October 26, 1976).

Following his capsule presentation of what one can expect to hear if the Government's motion is granted, Assistant United States Attorney Schall is kind enough to advise, in advance, that:

> "The Government does not intend to either call the informant as a witness or to disclose his identity." (Government's Memorandum, p. 8)

The defendants most strenuously oppose this application for a variety of legal and equitable reasons.

Many months prior to the hearing at bar, your deponent asked Mr. Schall, in the context of an informal discovery session at the United States Attorney's office, to indicate whether the Government's theory on the motion to suppress would be to develop a "Draper" (Draper v. U.S., 358 U.S. 307) situation, and that if it was, whether he would reveal the identity of the informant or, failing that, to indicate what information the informant relayed and his claimed past record for reliability (ie., information leading to "X" arrests and "Y" convictions). I was denied this discovery and told in words or substance that the facts underlying the agents predicate for surveillance of the offices of the No Name Transportation Company would be made clear at the hearing.

The fact is that, of course, this information was not made clear at the hearing. Rather, the prosecutor chose, for reasons

best known to himself, to limit his direct presentation and rebuttal case, to a focus of the events which transpired in and about 226 - 39 Street, Brooklyn.

The burden of going forward, in the first instance with facts sufficient to establish the propriety of the seizure rested with the Government. Rather than provide the Court with a full picture of the actions, motivation and supporting information upon which the Federal agents acted, the Court and defense counsel were treated to a shabby display of tailored testimony laced with inexplicable factual lapses. Indeed, the Court's determination to grant the defendant's motion to suppress was based as much upon the factual deficiency of proof leading up to surveillance at 226 - 39 Street as the gaps, omissions and failing which occurred once entry was made into the subject premises. Thus, even if the predicate for surveillance is prima facie established, the testimonial gaps following entry will not be cured at all.

In essence, the Government seeks a "second bite" of the apple. Some 27 days after this Court granted suppression, the defendants are placed on notice that they will be hailed back into Court on November 5, 1976 so that Mr. Schall can explain why he should obtain a second opportunity to establish that which he chose not to do or prove the first time around.

It should initially be noted, because it really cannot be denied, that all of the evidence Mr. Schall seeks leave of the Court to offer is not "newly discovered evidence". All of the facts sought to be established were known from the inception of plaintiff's counsel's assignment to this case. Reasons of hearing

strategy and not a significant new factual development is the moving force behind this motion.

To permit the Government to reopen this hearing will do nothing more than create dangerous precedent, within this Federal judicial district, permitting the Government to hold back upon its evidentiary proof, force the defense to commit itself factually and legally, and then if the nisi prius court rules adversely to the Government, demand leave to fill the factual gaps.

The real potential for the tailoring of testimony or the creation of fictitious "reliable" informants by Federal investigators where disclosure and production of the informant is readily denied, exist as properly articulated fears by defense counsel.

In arguing against a reopened hearing, we do not mean to suggest or imply that such a course should always be denied. What we do say is that where the Government's burden of proof is clear, where the evidence proferred is not "newly discovered" but was not produced for strategic reasons, and where the prior testimony of several of the Federal agents has been acandalously poor, the risks are simply too great, and the imposition on the Court by Government counsel too imposing.

WHEREFORE, we respectfully request that the Court deny the Government's application for leave to reopen the hearing and adhere to its prior decision.

/s/
ROGER BENNET ADLER

SWORN TO BEFORE ME this 3rd
day of November, 1976.

GWENN AGRESS
Commissioner of Deeds
City of New York No. 1-1397
Certificate Filed in N.Y. County
Commission Expires April 1, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

HERMAN BANNERMAN, et. al.,

Defendants.

----------x

DEFENDANT ERNEST L. MONTEVECCHI'S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR LEAVE TO REOPEN THE SUPPRESSION HEARING.

Preliminary Statement

This Memorandum of Law is submitted in support of an affidavit submitted in opposition to the Government's motion dated October 22, 1976 to reopen the hearing on the motion to suppress evidence.

POINT I

THE COURT SHOULD DENY ASSISTANT UNITED STATES ATTORNEY SCHALL'S MOTION TO REOPEN THE SUPPRESSION HEARING.

We are told that the claimed need for leave to reopen the suppression hearing is to permit Special Agent Garber to relate hearsay statements which were allegedly told to him by an informant. Implicit in Mr. Schall's offer of proof

is the understanding that while defense counsel can cross-examine Garber, the declarant informant will not be similarly produced for examination in the crucible of the well of the courtroom. Rather, we suppose, the Court and defense counsel will be left in the unenviable task of having to trust Garber that the informant really exists, is reliable, and provided vital believable information which in conjunction with the observations at the No Name garage, give rise to probable cause.

The Court and counsel are likewise told (see Mr. Schall's memorandum, fn. 4 on p. 11) that the decision in U.S. v. Tucker, 380 F.2d 206 [2 Cir. 1967] is controlling on the motion at bar. We respectfully disagree.

In the first instance, it should be observed that the Second Circuit's discussion of the procedure allowing a re-opening of the hearing was pure dicta. The central issue in the Tucker case was Judge Frankel's finding that the Government had established that probable cause existed, and, hence, that Judge Frankel did not err in denying the defendant's motion to compel disclosure of the Government's confidential informant. It was pure dicta, for the appellate court to intimate that had the district court found an absence of probable cause, based upon the Government's declination to reveal and rely upon a confidential informant's testimony, that permitting the Government to reconsider its posture would be proper. Certainly the holding in Tucker was not

advanced by this gratuitous discussion, particularly when almost a decade ago, when Tucker was decided, calendar problems endemic to the Speedy Trial Act were unknown.

Beyond nice academic discussions of whether the language in Tucker was dicta, clearly the motion at bar arises in an entirely different factual mileau than did Tucker. The Court of Appeals apparent concern, albeit pure dicta, was to protect against improvident disclosure of vital confidential informants.

As we read Chief Judge Lumbard's opinion, the Court of Appeals was concerned about protecting informants and was desirous of allowing the Government great leeway before improvident disclosure was ordered or a case dismissed because the disclosure determination was not fully considered.

The case at bar is totally dissimilar. At no point, had Mr. Schall called Special Agent Garber to the witness stand, was the Government placed in the quandry of either "giving up" an informant or facing dismissal of the accusatory instrument. The Government's informant, if there even be one, much less a reliable one, was as protected if Garber testified at the hearing or not.

The fact is that Tucker stands for the proposition that when disclosure of an informant is sought and denied, and that absent disclosure probable cause can't be established and the prosecution saved, leave to reconsider and reopen to permit informant testimony may be granted.

Nothing as weighty or legally surprising occurred in this case. The fact is that an entirely dissimilar factual pattern is being stretched, beyond the intent and meaning of mere dicta in a prior case, to allow the Government a privilege to which it is not entitled. There is a grave legal and factual distinction between the articulated fear in Tucker and the gamesmanship and trial strategy followed by Mr. Schall.

A grant of leave to reopen under these facts will merely serve as a license for Government attorneys to lay back in suppression hearings, see how the proof develops and if the dismissal motion is granted, move to introduce more proof. Tucker did not envision the introduction of mere ordinary routine governmental evidence. Clearly, the equities of Tucker do not hold herein.

Absent a showing that this evidence was not known or available at the time the Government rested, an insufficient basis has been demonstrated sufficient to move this Court to exercise its discretion.

It is hornbook law that discretion is exercised upon a showing of "good cause". Calculated governmental gamesmanship, when considered either in isolation or in conjunction with the gaps and conflicts in prior agent testimony, and the genuine fear of tailored testimony require the Court to bring down the final curtain upon a shoppy F.B.I. performance. It

ill-behooves the Government to seek more Court time for this drab performance.

POINT II

THE SEIZURE OF EVIDENCE FROM WHICH THE UPSTAIRS OFFICE AT THE NO NAME TRANSPORTATION COMPANY WAS UNLAWFUL.

The testimony at the hearing on the motion to suppress revealed that following the warrantless arrest of defendant SCHNEIDER in the downstairs garage, the arresting agents proceeded up the staircase to the second floor offices where the remaining defendants were taken into custody. The record further reveals that it was only after the remaining defendants were marched down to the garage area and handcuffed, that the agents returned to the upstairs office where a full blown warrantless search of the entire office was executed.

The defendants contended during legal colloquoy following the evidentiary phase of the hearing that the Government was obliged to obtain a search warrant before it was entitled to ascend the staircase, re-enter the office, and conduct a full blown search. In view of the secured state of the entire building, the defendants' apprehension and the impossibility of destruction of evidence, it was an intentional reluctance to submit to the judicial process by making application for a search warrant, and not a lawfully recognized exigency sufficient to dispense with the Fourth Amendment's warrant requirement which explains the agents' conduct.

We contend, and believe that the holding in U.S. v. Rodriguez, 535 F.2d 834, 849 [2 Cir. 1976], confirms, the chain of events authorizing warrantless activity terminated with the defendants' arrest in the office. While we disputed the propriety of the defendants' arrest in the office and still do, because we do not believe that the arresting agent had probable cause to arrest, even assuming he had probable cause, this would not excuse his failure to obtain a warrant. - There is indication that the agents knew of at here

The cases are reasonably clear that the conditions precedent for warrantless arrest are probable cause plus exigent circumstances*.(see: U.S. v. Canada, 527 F.2d 1374, 1379 [9 Cir. 1975]). Unless a claim of probable cause is linked with a recognized urgency (and the case at bar was not), the agents were obligated to secure the office and make the 15 minute trip to the Eastern District Courthouse to apply for a warrant.

The failure to obtain a warrant has not been legally or factually explained. Accordingly, suppression of the items seized from the upstairs office should be suppressed, even if the Court is inclined to reconsider the propriety of its earlier decision ordering total suppression.

*The bulk of these cases involve car searches where the potential for movement is far different from that of a second floor office.

CONCLUSION

THE GOVERNMENT'S MOTION FOR LEAVE TO REOPEN

THE SUPPRESSION HEARING SHOULD BE DENIED.

DATED: NEW YORK, NEW YORK
November 3, 1976

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Defendant
MONTEVECCHI
522 Fifth Avenue
New York, New York 10036
(212) 682-4066

ROGER BENNET ADLER
Of Counsel

A 228

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

HERMAN BANNERMAN, et. al.,

Defendants.

AFFIDAVIT
75 CR 945

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STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

AARON SCHACHER, being duly sworn on oath, deposes and says:

I am the attorney for VINCENT F. CIOFFI and as such am fully familiar with the facts and circumstances surrounding this case.

I submit this Affidavit in opposition to a motion by the Government dated October 22, 1976 seeking leave to reopen the hearing held in conjunction with defendant's motion to suppress a quantity of "Stanley" tools, No Name Transportation Company business records, and related books and records and tangible physical evidence seized in the downstairs garage and second floor offices of the No Name Transportation Company.

S T A N D I N G

It is clear, and the testimony on the hearing confirms, that my client was present in the upstairs office of the No Name Transportation Company at the time the F.B.I. agents burst into the No Name Transportation Company and proceeded to arrest defendant SCHNEIDER in the downstairs garage and the remaining

six defendants in the second floor offices.

Based upon my client's presence on the premises at the time the contested search occurred, and the fact that his possession at the time of the seizure constitutes an element of the offense charged, automatically establishes standing to move to suppress the evidence seized.

THE MOTION TO REOPEN

As I understand Assistant United States Attorney Schall's position, he desires leave to reopen the suppression hearing to introduce agent testimony of events which pre-dated the actual surveillance of the No Name Transportation Company. None of the information can by any stretch of the imagination construed to constitute newly discovered evidence.

Rather, it appears that prosecutor Schall determined to conduct the suppression hearing in "close to the vest" fashion, knowingly and coldly limiting his factual presentation to the narrowest possible.

Notwithstanding the highly unconvincing nature of much of the agents' testimony, Mr. Schall chose to present evidence during its rebuttal case, having nothing to do with the pre-surveillance period.

Surely Mr. Schall knew, as all of us well knew when the defendants rested, that the Government's showing of probable cause was non-existent if not highly tenuous. Nonetheless, he declined to add to the record, even at that late date.

Only after the Court rendered its opinion, following many days of testimony, did Mr. Schall allege that he was presently

in the custody of additional facts, which, he claimed, would neatly cure all of the Court's findings of evidentiary deficiencies.

Beyond the terrible imposition Mr. Schall's posture places upon the Court, the defendants and their attorneys, a recognition that suppression hearings can be conducted in this fashion will create a dangerous precedent within the Eastern District.

Where all of the "new" facts alleged by Mr. Schall were known prior to his announcement that "the Government rests", only the most extraordinary development, approaching the finding of newly discovered evidence, should permit the reopening of a hotly contested criminal evidentiary hearing.

Nothing short of Mr. Schall's evidentiray miscalculation can approach to explain the motion at bar. Rather than err on the side of introducing more evidence than was necessary, Mr. Schall chose to "cut his proof to the bone". It now appears that his neat calculations were wrong, and his determination to focus solely upon the conduct of defendant SCHNEIDER and others outside the garage, was in error.

The problem, however, is why this Court should allow him to attempt to prove now, that which he could have proven during the hearing in chief. Clearly, the equities are not with the prosecution, and the defendants should not be prejudiced because of the prosecutor's judgmental errors and trial strategy.

Beyond the question of the propriety of the motion to reopen, the Court's ruling was based not merely upon a failure of proof, but upon the lack of quality and gaps in the testimony of

the F.B.I. agents who testified at the hearing. Clearly than even if additional pre-surveillance testimony is offered, it will not cure a qualitative evidentiary deficiency. All that a reopened hearing will accomplish is expend more valuable Court time upon a hopeless evidentiary situation. Justice will not advance in such a context.

WHEREFORE, I respectfully pray that the Court adhere to its initial decision suppressing evidence and deny the motion for leave to reopen the hearing.

AARON SCHACHER

SWORN TO BEFORE ME this 4
day of November, 1976.

78

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

HERMAN BANNERMAN, et. al.,

Defendants.

----------x

DEFENDANT VINCENT F. CIOFFI'S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR LEAVE TO REOPEN THE SUPPRESSION HEARING.

Preliminary Statement

This Memorandum of Law is submitted in support of an affidavit submitted in opposition to the Government's motion dated October 22, 1976 to reopen the hearing on the motion to suppress evidence.

POINT I

THE COURT SHOULD DENY ASSISTANT UNITED STATES ATTORNEY SCHALL'S MOTION TO REOPEN THE SUPPRESSION HEARING.

We are told that the claimed need for leave to reopen the suppression hearing is to permit Special Agent Garber to relate hearsay statements which were allegedly told to him by an informant. Implicit in Mr. Schall's offer of proof

is the understanding that while defense counsel can cross-examine Garber, the declarant informant will not be similarly produced for examination in the crucible of the well of the courtroom. Rather, we suppose, the Court and defense counsel will be left in the unenviable task of having to trust Garber that the informant really exists, is reliable, and provided vital believable information which in conjunction with the observations at the No Name garage, give rise to probable cause.

The Court and counsel are likewise told (see Mr. Schall's memorandum, fn. 4 on p. 11) that the decision in U.S. v. Tucker, 380 F.2d 206 [2 Cir. 1967] is controlling on the motion at bar. We respectfully disagree.

In the first instance, it should be observed that the Second Circuit's discussion of the procedure allowing a re-opening of the hearing was pure dicta. The central issue in the Tucker case was Judge Frankel's finding that the Government had established that probable cause existed, and, hence, that Judge Frankel did not err in denying the defendant's motion to compel disclosure of the Government's confidential informant. It was pure dicta, for the appellate court to intimate that had the district court found an absence of probable cause, based upon the Government's declination to reveal and rely upon a confidential informant's testimony, that permitting the Government to reconsider its posture would be proper. Certainly the holding in Tucker was not

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Beyond nice academic discussions of whether the language in Tucker was dicta, clearly the motion at bar arises in an entirely different factual mileau than did Tucker. The Court of Appeals apparent concern, albeit pure dicta, was to protect against improvident disclosure of vital confidential informants.

As we read Chief Judge Lumbard's opinion, the Court of Appeals was concerned about protecting informants and was desirous of allowing the Government great leeway before improvident disclosure was ordered or a case dismissed because the disclosure determination was not fully considered.

The case at bar is totally dissimilar. At no point had Mr. Schall called Special Agent Garber to the witness stand, was the Government placed in the quandry of either "giving up" an informant or facing dismissal of the accusatory instrument. The Government's informant, if there even be one, much less a reliable one, was as protected if Garber testified at the hearing or not.

The fact is that Tucker stands for the proposition that when disclosure of an informant is sought and denied, and that absent disclosure probable cause can't be established and the prosecution saved, leave to reconsider and reopen to permit informant testimony may be granted.

Nothing as weighty or legally surprising occurred in this case. The fact is that an entirely dissimilar factual pattern is being stretched, beyond the intent and meaning of mere dicta in a prior case, to allow the Government a privilege to which it is not entitled. There is a grave legal and factual distinction between the articulated fear in Tucker and the gamesmanship and trial strategy followed by Mr. Schall.

A grant of leave to reopen under these facts will merely serve as a license for Government attorneys to lay back in suppression hearings, see how the proof develops and if the dismissal motion is granted, move to introduce more proof. Tucker did not envision the introduction of mere ordinary routine governmental evidence. Clearly, the equities of Tucker do not hold herein.

Absent a showing that this evidence was not known or available at the time the Government rested, an insufficient basis has been demonstrated sufficient to move this Court to exercise its discretion.

It is hornbook law that discretion is exercised upon a showing of "good cause". Calculated governmental gamesmanship, when considered either in isolation or in conjunction with the gaps and conflicts in prior agent testimony, and the genuine fear of tailored testimony require the Court to bring down the final curtain upon a shoppy F.B.I. performance. It

ill-behooves the Government to seek more Court time for this drab performance.

POINT II

DEFENDANT VINCENT CIOFFI HAS STANDING TO MOVE TO SUPPRESS EVIDENCE.

While it is certainly true that Fourth Amendment rights may not be vicariously asserted, since at least the Supreme Court's decision in Jones v. U.S., 362 U.S. 257, 80 S.Ct. 725 [1960], a defendant against whom seized evidence will be offered at a judicial proceeding has automatic standing to contest the propriety of the seizure where possession is an essential element of the offense charged (see also: People v. Gonzalez, 31 N.Y.2d 787, 339 N.Y.S.2d 112, 113 [1972]; People v. Hansen, 38 N.Y.2d 17, 377 N.Y.S.2d 461 [1975]). In Brown v. U.S., 411 U.S. 223, 93 S.Ct. 1565 (1973), the Supreme Court specifically held (see 411 U.S. 228-229, 93 S.Ct. 1569) that it was not reconsidering the overruling Jones and abandoning the "automatic standing" rule. Indeed, the Government itself concedes that the automatic standing rule is "alive and well" in the Second Circuit (see Government's memorandum, p. 30).

Rather, the Court simply stated, in the context of an opinion finding that defendants Brown and Smith lacked standing because they:

> "[a] were not on the premises at the time of the contested search and seizure;
>
> [b] alleged no proprietary or possessory interest in the premises;
>
> [c] were not charged with an offense that includes as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure."

(See Brown v. U.S., supra, 411 U.S. 229, 93 S.Ct. 1569).

In applying these standards to the case at bar, it is clear that defendant CIOFFI has standing to challenge the seizure of all items seized within the No Name Transportation Company building. His presence on the premises at the time the contested seizure was executed, and the allegation in the indictment that unlawful possession occurred on the date of the seizure (September 2, 1975) supplies a two fold basis sufficient to permit CIOFFI to raise a cognizable Fourth Amendment claim.

Indeed to hold otherwise and follow Mr. Schall's suggestion that standing does not lie would fly totally in the face of long established precedent (see also: U.S. v. DeMarco, 488 F.2d 828, 829 n.1 [2 Cir. 1973]) and would do violence to proper concepts of stare decisis. The Court should decline to follow the treacherous path so blithefully suggested by Government counsel.

POINT III

THE SEIZURE OF EVIDENCE FROM WHICH THE UPSTAIRS OFFICE AT THE NO NAME TRANSPORTATION COMPANY WAS UNLAWFUL.

The testimony at the hearing on the motion to suppress revealed that following the warrantless arrest of defendant SCHNEIDER in the downstairs garage, the arresting agents proceeded up the staircase to the second floor offices where the remaining defendants were taken into custody. The record further reveals that it was only after the remaining defendants were marched down to the garage area and handcuffed, that the agents returned to the upstairs office where a full blown warrantless search of the entire office was executed.

The defendants contended during legal colloquoy following the evidentiary phase of the hearing that the Government was obliged to obtain a search warrant before it was entitled to ascend the staircase, re-enter the office, and conduct a full blown search. In view of the secured state of the entire building, the defendants' apprehension and the impossibility of destruction of evidence it was an intentional reluctance to submit to the judicial process by making application for a search warrant, and not a lawfully recognized exigency sufficient to dispense with the Fourth Amendment's warrant requirement which explains the agents' conduct.

We contend, and believe that the holding in U.S. v. Rodriguez, 535 F.2d 834, 849 [2 Cir. 1976], confirms, the chain of events authorizing warrantless activity terminated with the defendants' arrest in the office. While we disputed the propriety of the defendants' arrest in the office and still do, because we do not believe that the arresting agent had probable cause to arrest, even assuming he had probable cause, this would not excuse his failure to obtain a warrant.

The cases are reasonably clear that the conditions precedent for warrantless arrest are probable cause plus exigent circumstances* (see: U.S. v. Canada, 527 F.2d 1374, 1379 [9 Cir. 1975]). Unless a claim of probable cause is linked with a recognized urgency (and the case at bar was not), the agents were obligated to secure the office and make the 15 minute trip to the Eastern District Courthouse to apply for a warrant.

The failure to obtain a warrant has not been legally or factually explained. Accordingly, suppression of the items seized from the upstairs office should be suppressed, even if the Court is inclined to reconsider the propriety of its earlier decision ordering total suppression.

*The bulk of these cases involve car searches where the potential for movement is far different from that of a second floor office.

CONCLUSION

THE GOVERNMENT'S MOTION FOR LEAVE TO REOPEN THE SUPPRESSION HEARING SHOULD BE DENIED.

DATED: BROOKLYN, NEW YORK
November 3, 1976

Respectfully submitted,

AARON SCHACHER
Attorney for Defendant CIOFFI
32 Court Street
Brooklyn, New York 11201

ROGER BENNET ADLER
Of Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

HERMAN BANERMAN,
VINCENT F. CIOFFI,
KENNETH R. LEMANSKI,
FRANK P. MENGRONE,
ERNEST L. MONTEVECCHI,
ARNOLD SCHNEIDER and
JOSEPH SCHNITZER,

75 Cr. 945

Defendants.

DEFENDANT SCHNEIDER'S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION TO REOPEN THE SUPPRESSION HEARING.

POINT ONE

THE MOTION TO REOPEN THE SUPPRESSION HEARING SHOULD BE DENIED

The Government belatedly seeks the right to reopen the suppression hearing in order that the Court consider de novo

the various issues originally resolved against the Government.

In essence the Government requests permission to call a witness to explain the reasons for the presence of the surveillance agents in the vicinity of the garage in question. More particularly, the Government wishes to now call FBI Agent Garber to testify that an informant told him that a certain truck bearing the letters RVD on it would be driven to a then unknown location where the owners of the truck would purchase the stolen Stanley Tools. The agents would then follow the truck to its ultimate destination. (Gov't memorandum pages 7-8).

It is, of course, obvious that Garber's anticipated testimony is not newly discovered. To the contrary, the Government acknowledges as indeed it must, that the testimony of Garber was deliberately withheld-as a conscious tactical choice--their reason being their claimed desire to protect the identity of the informant. (Government's memorandum page 11, footnore 4).

It is noteworthy, however that the proffered testimony of Garber will not involve disclosure of the informant's identity, nor does the Government even now intend to disclose the identity of the informant. The Government takes the categorical position (Gov't memorandum of law, page 8) that it "does not intend to either call the informant as a

witness or to disclose his identity".

Thus, if the Government still fully intends to refuse to disclose the identity of the informant, then presumably Garber's testimony will not be permitted by them to run the risk of such disclosure. It follows that what the Government in reality seeks to accomplish by re-opening the hearing is to do now what they could as well have done in the first instance, viz, to call Garber as a witness to testify that the informant (whom they would not have then, or will now disclose) told them which truck to follow in hopes of ascertaining the location of the stolen merchandise.

The Government seeks now to overcome this self-created problem by attempting to bring their case within the narrow dictum announced in U.S. v. Tucker, 380 F. 2d 206 (2 Cir., 1967).

Tucker is inapposite. In that case the Court considered the specific dilemma faced by prosecutors in trying to anticipate in advance whether they could establish probable cause without disclosure of the identity of the informant or in the alternative, to disclose his identity only to discover that it was unnecessary after-all.

The Tucker Court sought to resolve this Hobson's choice by allowing the prosecutor to delay his decision as to disclosure until the trial Court heard all the evidence and made its ruling. If that ruling were unfavorable to the Government, the latter could then reconsider its

decision not to disclose. *

It is clear from the opinion in Tucker that the Court's discussion dealt exclusively with a situation where the Government would be allowed an opportunity to reconsider disclosure of the informant's identity in order to establish the probable cause that would otherwise be lacking under the trial court's proposed ruling. Here, of course, the Government has no such intention in any event to reveal the identity of the informant. Therefore the Tucker case is inapplicable to the case at bar.

It is implicit in the Tucker dictum that the "two bite" approach was intended to be a special departure from the norm because of the unique case law on the subject of disclosure of informants. Those decisions involve delicate balancing of conflicting rights between the Government's interest in protecting the identity of its informants on the one hand and on the other hand the accused's constitutional rights of confrontation and cross examination (McCray v. Illinois, 386 US. 300, 87, S. Ct. 1056).

* This procedure would apparently not be a matter of the prosecutor's absolute right but a procedure within the discretion of the trial court. The Court of Appeals stated at page 214: " It would seem that a decision to follow such procedure would often be warranted..." (Underscoring ours).

Certainly, the Court of Appeals in Tucker did not intend to create a radical departure from long established rules and thereby create a new procedure whereby the prosecution could repeatedly reopen hearings to bring in ordinary witnesses which they initially withheld for strategical rather than imperative reasons such as apply uniquely to informants.

Yet that is what the Government intend to do here by calling Agent Garber to testify to events to which he could well have testified on the Government's direct case without jeopardizing the Government's position.

CONCLUSION

THE MOTION TO RE-OPEN THE SUPPRESSION HEARING SHOULD BE DENIED.

Dated: Brooklyn, New York
November 3, 1976

Respectfully submitted,

EVSEROFF & SONENSHINE

Attorneys for Defendant
SCHNEIDER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

HERMAN BANERMAN, VICENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE, ERNEST L. MONTEVECCHI, ARNOLD SCHNEIDER, AND JOSEPH SCHNITZER : 76-CR-608

Defendants. :

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United States Courthouse
Brooklyn, New York

November 5, 1976
9:00 o'clock A.M.

B e f o r e :

HONORABLE GEORGE PRATT U.S.D.J.

PERRY AUERBACH
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ANTHONY A. SCHALL ESQ.
Assistant U.S. Attorney

CARL BERNSTEIN, ESQ.
Attorney for Defendant Banerran and for the purposes of this hearing for Defendant Mengrone.

AARON SCHACHER, ESQ.
Attorney for the Defendant Cioffi

LAWRENCE HOCHHEISER, ESQ.
Attorney for the defendant Lemanski

ROGER ADLER, ESQ.
Attorney for the Defendant Montevecchi

WILLIAM SOBNSHINE, ESQ.
Attorney for the Defendant Schneider

EMANUEL GROSSMAN, ESQ.
Attorney for the Defendant Schnitzer

THE COURT: I think I better hear from Mr. Schall first. Why don't you gentlemen sit down and relax and we will see what argument is needed.

Your papers I read Mr. Schall.

MR. SCHALL: Thank you. Your Honor, I won't be lengthy then. I will simply address myself at this point to the motion to re-open the suppression hearing.

I rest my case primarily on the authority as is indicated in my papers of U.S. versus Tucker, and the Comissiong decision. I respectfully submit that these cases clearly stand for the proposition that in a situation where the Government presents evidence in a suppression hearing and holds back certain evidence with the desire to protect the identity of the informant, it should be granted leave to re-open if the motion to suppress is granted on the evidence which is presented.

I recognize that Tucker arises in the context of a different stage in the proceedings. Namely, where evidence has already been presented of the kind that I'm seeking now to introduce, and the question simply is whether or not the Government should have to present the informant himself to testify.

I realize that Tucker arises in that factual

setting but I think usually the underlying rational is the same and that it clearly supports the position which the Government is taking at this time.

Contrary to the assertion in the papers by the defense that this was gamesmanship, the fact of the matter is that the decision not to present the testimony which we are now seeking to introduce was made after I evaluated the evidence.

It was my feeling that we could prevail on a probable cause finding based upon what we did in fact present and also the feeling that to present the evidence which we are now seeking to introduce would jeapordize the safety and the identity of the informant.

And I would say that while now we are prepared to go ahead and present this evidence we recognize that by presenting this evidence we will be giving up more information about the informant and thus possibly jeapordizing his safety, but we are willing to go this far in view of what we regard as the importance of the case.

I think that the underlying rational that I derive from Tucker and Comissiong which supports me is the fact that both of those cases are based upon the proposition that this is a proper course to

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follow when the Government acts in the way it does so as to protect the identity of the informant and that is the reason that at the prior suppression hearing in September, the evidence which we are now seeking to introduce was withheld and not presented.

We take the view that obviously it will not have the same effect as giving up the informant's name; it will nevertheless aid in a disclosure of his identity. It will give more identity information which will possibly lead on to his identity, but it is a risk which we are prepared to take at this time and our decision previously, not to go was based upon the desire to protect the informant and also an assessment of the facts, in the belief on my part that we would be able to meet the probable cause requirements based on the evidence which we presented.

I would state also in response to, I think the point which Mr. Adler raises in his motion papers. He says in there that if at the end of the testimony of Agent Garber, and the additional surveillance testimony, the Court could find itself in the position of not being able to believe that there was such an informant and in fact not being in a position to be able to make a proper decision. I would respond, Your Honor, that the Tucker case squarely recognizes

that possibility.

If at that point we came down to a situation where the Court said,"fine I've heard the Government testimony, but now I'm not satisfied still. I want to hear the informant himself", at that point Your Honor, we would either have to place the informant on the stand or we would have to, in essence, fold our tents.

What I'm saying is that the possibility, the fear which Mr. Adler voices in his papers is not a realistic one because if it comes down to that point, if the Court is not satisfied, if the Court satisfied with what it has, it can make its decision.

If the Court is not satisfied, then we have to decide and if we at this point still stand by our position not to expose the identity of the informant, we are out of the ball game.

So, I'm saying that the spector which Mr. Adler raises, is I would submit not a realistic one.

Finally, I would just like to briefly respond to it with respect to the question of standing. I'll primarily rest upon what we have stated in our memorandum of law. Just to note that it is out position that the defendants who were upstairs, with

with the exception of Mr. Montevecchi cannot say that any interest at least on this record, at least, that any privacy interest of there's was violated.

Secondly, we are talking at least in their case not Mr. Montevecchi's case, but in their case as conspirators and aiders and abettors. Even if it came down to the situation where the Court said under Jones that I give them automatic standing, still, and the Court went even so far as to say that aiding and abetting is not far enough removed in terms of the necessary elements from the possessary offense requirement.

We would be prepared I think at that point if need be to sever and proceed on the conspiracy count. I think we would be on proper ground then to make an argument as the cases I've cited indicated that even if you accept the automatic standing rule it still has to be read in the context of possession of being a necessary element of the ofense and clearly for a conspiracy charge that is not the case.

So, just one final point that I would like to address myself to with respect to the question of probable cause itself. I won't argue this now. I think it's really more important if the Court

grants the Government's motion to argue that I have established probable cause at the end of any new evidence that comes in.

I would just like to say that in response to points raised by Mr. Adler in his papers, he states that it was improper for Agent Armstrong, he says assuming that the Government could go properly into the upstairs office, it was improper for Agent Armstrong to go back downstairs or upstairs.

I would call Your Honor's attention to the transcript of the suppression hearing, page 574-575, 582 through 583 and 671, and Armstrong said he observed items of evidence at that time. I think clearly under those circumstances if we assume he is validly up there at that point, it certainly just simply couldn't make any sense to after he has seen the defendants downstairs and placed them under custody, for him to go to obtain a warrant to search a room he has seen.

I will rest my oral argument on those points. I won't make my argument on probable cause unless the Court grants our motion and new evidence does come in.

THE COURT: All right. Who wants to be first?

MR. SOENSHINE: I will.

A 254 THE COURT: Mr. Soenshine.

MR. SOENSHINE: If it please the Court, I think what the United States Attorney is basically seeking here is a rather radical departure from what has long been established in this Court generally, as to reopening of hearings merely because the result is unsatisfactory, and now you want to present other proof that you could have in the first place presented. You chose even to do so but elected to be made not to do so and now it is regretted.

The Tucker case really --

THE COURT: He makes it clear it wasn't a matter of oversight. This was intentional, strategic decision that they made.

MR. SOENSHINE: I think so, Judge, and he therefore says that he comes within the meaning of what is really dictum, but which we can take more seriously for the moment of this Tucker case. Now, Tucker is an entirely different situation and it is specifically limited to a situation that is a very common problem that prosecutors have. I recognize that problem. I have had that problem to deal with.

What the problem becomes is this and it is only as to informants. In presenting the proof, the United States Attorney is very frequently faced with

a problem. He does not wish to disclose the identity of the informant. And consequently, he must in advance decide whether he has enough evidence irrespective of the informant or he does not. If he comes to the conclusion that he does have enough evidence, then he proceeds on the theory that he is not going to disclose the informant anyway. Sometimes he may come to the conclusion that he hasn't got enough evidence and he thus makes a policy decision totally unrelated to the facts or the merits of the case, as to whether or not he should put the informant on the stand or to otherwise disclose his identity. Sometimes when he does that, when the case is all over, he now says to himself, well, the motion to suppress has been denied and apparently would have been denied anyway and so I could have avoided the situation after all and unfortunately, I did not.

It was that problem and only that problem that the Court of Appeals was dealing with in Tucker. They said, largely because there are verriding considerations of the Government's need to protect the identity of an informant, they said we will, in effect, permit it under certain circumstances, and apparently from the language it appears to be discretionary with the Court, but certainly under Tucker it is his own

that the Court can consider. And the Court now says to the United States Attorney, I'm going to have to grant rather the motion to suppress because you have not established probable cause.

However, bearing in mind the very delicate policy decisions involved in whether or not you wish to disclose your informant before I make my determination a final one, I will give you the opportunity to present further evidence by producing the informant or identifying him if you feel that will make out the probable cause.

And now, the United States Attorney has to make the election. Either let the matter rest or disclose the identity of the informant. But the exact opposite is what the United States Attorney is doing here. He is starting out by saying no matter what was in this case, I have made a final determination. I will not disclose the identity of the informant.

What I would really like to do is put on more agents who will testify without disclosing the informant; what they knew in reference to how [illegible] agents, the other agents came to be at the scene. This is precisely what they are doing. And that is a situation that not only is not contemplated by Tucker except that implicitly, the adverse situation

would be contemplated by Tucker because Tucker was dealing with this question of what do we do with the informant. But there are no policy considerations that deal with whether I should call two agents or three agents or five agents. These are determinants the United States Attorney makes himself and if we were to establish the kind of precedent where every United States Attorney can decide in advance, well, why should I give too much away? Let me go through the hearing. I'll make the Judge do the work and if he decides in my favor, fine;if not, I'm going to say, wait a minute, let's go some more and now we are going to do it again and this is basically what he is doing. He is doing it exactly for the reason that he now wishes to avoid a decision that he had made earlier. He tries to call this a Tucker case.

In substance, what he is saying is look, I really have a horse that I'm trying to bring in this courtroom but the Tucker I can only bring a cow. So I'm going to put a big sign on the horse saying it is a cow; and I say Your Honor, that is not what our rules are set aside for. That is not what the situation is and it is nothing that Tucker had in mind, except that I am saying in any other situation -- I am saying we will not permit this only in the informant situation. Thank you, Your Honor.

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MR. ADLER: May it please the Court, good morning. I will address myself to the point which goes beyond Mr. Soenshine's very able opinion in this case. Your Honor, what I would like to address myself to are certain other aspects of the Tucker decision. The first aspect to Mr. Schall's motion, I think turns upon the basis of Your Honor's decision. I am familiar with it, I am sure Mr. Schall is familiar with it, and I am sure you are familiar with it as you read it. My understanding of the decision as it was read in this Court a little bit short of a month ago was it was not merely a failure of proof which would deal with a quantitative failing, but a qualitative failing based on the testimony which Your Honor and all the defendants heard in this Courtroom. My recollection is, and you can certainly review it yourself, that it was conflict in the testimony and there were notorious lapses with the agents' testimony, which likewise entered into Your Honor's decision that if a determination on the motion to suppress turned upon the Government's establishment of five elements, Your Honor did not find that suppression was warranted, because the Government had only proven four to your satisfaction, the fifth being the first element of how the agents

got to 39th Street, not being offered on the witness stand was a failure which militated against the finding of probable cause. Rather, Your Honor, as I heard Your Honor's opinion, at the end of the testimony it was certain factual conflict within the agents' testimony relative for purposes of my hypothetical, the last four elements of probable cause, which is entered because the Government failed to establish probable cause. So it seems to me that even assuming arguendo that the Court is prepared to set it aside, to permit Agent Garber or any other agent to testify as to hearsay statements, statements applied to them by an alleged informant, I don't believe that Agent Garber's testimony or any other agent's testimony is going to clear up the factual conflict, and the feeling which was well known to Your Honor and I noted in his oral opinion about a month ago.

Turning my attention solely to the testimony of Agent Garber, I don't want to get into my analysis of Mr. Schall's representation as to what Garber can testify to, but I submit most respectfully to Your Honor that if we come back here again in several weeks or several months that what we are going to face is the testimony of an agent who's going to

tell, if we want to believe it, that there was an informant who was reliable, who gave information, and based upon that information, and we have to trust Agent Garber at this point, that's why all these agents came to 39th Street.

THE COURT: That's what Mr. Schall tells us they would testify to. Not only that, but he will tell them the truck they were told to follow if it was coming there for the purpose of a pick-up as part of a sale transaction, then it's going to pick up the stolen tools from these premises. In essence, I think that's what he wants to add on the record.

MR. ADLER: My opinion is it is insufficient to open the hearing, and it was available to him at that time. If it was a case like in Tucker where it was a grave interpretation which the Government would make, whether there was any merit to it, but there was nothing stopping Mr. Schall at the very beginning of the hearing to really give us a picture to what had happened, to put Agent Garber as his first witness and give testimony in September that he could have given, and it's only back after he sat back after the hearing that he was confronted with this. Agent Garber is not a new witness. The information was known to them, to the Government, and only

strategic reasons could be used, and he sat back and really chose not to come forward with it, and I am concerned, Your Honor, I don't understand the ruling in this case. I don't understand whether the Banarman case stands for any legal proposition other than obviously the importance that a decision by Your Honor today will have to the future of any of the defendants here. I believe that if Your Honor is to grant this motion, Your Honor is not going to be merely following Tucker, the Government is asking Your Honor to really blaze new trails for the Government, and I am really concerned as a lawyer before the bar of this Court in really establishing the precedent in situations where Garber's testimony could have been offered when the informant would never have been jeopardized if Garber had been properly prepared. The Government will now in this Courthouse will be citing Judge Pratt's decision in Banerman in a situation where they will have a bifurcated decision. And, they will find out the strategy, see how the Judge ruled, and if you are not happy with it, make a motion to reopen, as Mr. Schall did. I don't think it's the legislation that the Court is used to. I don't think it's the standard of the United States Attorney's office. I

think we all should be well aware of the fact that Tucker does not mandate what Your Honor is going to do here. If you are going to -- Not because it's the Government's suggestion -- That's simply not the case.

The last aspect I would like to address, and only briefly state is a question of finality. All of us, those of us who started out as prosecutors within the system are all concerned about an element of finality, when does a when there will be a stop to it. The facts were brought out in the hearing, and there was a ruling by Your Honor. If Agent Garber gave more testimony, the Government would then have another conference, and the informant might be produced. I don't know that Mr. Schall can definitively say what their position will be ultimately. I say that the time has come down to the end of this hearing and the end of this case. If there was newly discovered evidence or some situation that approached Tucker, I would say, "Fine, give them that opportunity." It's not. I think it's a burden on the Court. I think it's a burden on the litigants. I think it's a burden on the lawyers. I say end this case now. Deny this motion, and let's proceed with whatever remaining case the Government can have if they are able to with the evidence that Your Honor has

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suppressed. Thank you.

THE COURT: Thank you.

(Continued on next page.)

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MR. SCHACHER: One point Your Honor, without again repeating what the other attorneys have done. I want to bring one point to Your Honor's attention. Mr. Schall indicated that he would have Agent Garber testify and indicate to the Court why they were in the area in the first place. In that there was an informant who told that there was a truck to go to the address which they did not know, but to pick up the stolen merchandise. If Agent Garber testifies to that, it merely strengthens our case because the other agents got to the destination at 2:00 o'clock when they saw this truck arrive at a destination and go into the garage. Knowing that that truck was going to be loaded with merchandise and it would take many hours for it to be loaded, why did they not, at that time, ride fifteen minutes and obtain a search warrant? They didn't do it.

If that was true, that Agent Garber said or is intending to testify to, then they have defeated their own purpose. Mr. Schall is defeating his purpose by saying this is the testimony he wanted Agent Garber to testify to at this point. That is what.

MR. HOCHHEISER: I just wanted to mention something at this point. One, that I'm sure and I think Your Honor is quite aware of, and I want to

emphasize it in so many words, and that is we never got to the stage of the proceedings where Tucker speaks of. Mr. Schall says Tucker speaks of that in his argument when he said that if Your Honor granted leave to reopen the hearing and if they did take testimony about the informant and then if Your Honor decided that Your Honor wasn't sure,but wanted to see the informant and not identify him, then, of course, Tucker provides that that is so.

In that respect he is right but we never got there. We never got there. And I just wanted to emphasize that point. Secondly, now, as you know, this is more than just a strategic decision to put in all the truthful testimony you have and to leave out something that might harm someone,such as a confidential informant.

This, in very plain language, as I see this is a situation not where Mr. Schall I am sure made any decision,but some of the witnesses evidently decided that they would add things that really weren't true. I mean that is my view of it. Most respectfully they said things that weren't true to substitute for the truthful testimony about the informant, assuming it is truthful.

THE COURT: You are not saying it is not true

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that there was an informant are you?

MR. HOCHHEISER: No, I'm saying --

THE COURT: Let's face it there had to be --

MR. HOCHHEISER: I assume so, yes. I assume so. And I guess it was sort of something that almost could be inferred from the facts as it was given. But here we have witnesses who evidently took it upon themselves to state that which is not true.

It wasn't a strategic decision to say let's see what Judge Pratt says about the evidence, because had that been believed it would have been probable cause most likely. The fact of the matter is what they didn't count on was that we would really disprove the possibility or the probability that such a thing could be true.

Then they were stuck with -- they were disclosed that she told fibs and now they want to come back and say now we get caught with the fibs we want to come back with the real evidence.

There isn't any case that says they can do that. And that's all I wanted to say.

THE COURT: Anything else?

MR. SCHACHER: Nothing further.

MR. SCHALL: In response to one point that Mr. Growman raised. He stated that the Government

should have that the agent should have gone and applied for a warrant at that point. I submit that they couldn't.

THE COURT: They couldn't?

MR. SCHALL: They could not have on the evidence they had. The important thing is that the informant as I would submit the evidence, would show stated to the agents, that the truck would be going to the location where the stolen goods would be located.

He himself as the evidence will show if it is permitted to come in, did not state he did not know where that location was. So I would submit, Your Honor, at that point all the agents had was information that the truck would be going to a particular location where it would be picking up the stolen tools.

If he had said they are at this location that would have been a different situation but it was through the events, it was only through the events of the afternoon, the positioning of the vehicles, the movement of the cartons, and I would submit the flight of Mr. Schneider that the probable cause for the belief that the goods were inside arose.

But in any event, Your Honor, the question is whether or not there was probable cause for the arrest of Mr. Schneider and that's the question.

A 268 THE COURT: When you say, given the informant's information information, everything happened, that happened up to the time that Mr. Schneider came out with the box under his arm there was probable cause up til then?

MR. SCHALL: I think it's a close question, Your Honor. I think that Mr there might have been probable cause but I don't think at that point that there was time for a warrant to be obtained. I think that it's possible.

THE COURT: The only thing of any locking insignificance here that happened in that period of time was the giving out of the three or four boxes that were put into the trunk of another car.

MR. SCHALL: Well, also Your Honor, I would submit that it is a significant point, the positioning of the vehicles, the working and doing repairs on vehicles. I submit that the RVD truck arrives, another truck comes out and goes back in, and this one backs in. I think that would give grounds to the inference or the belief that vehicles were being repositioned to facilitate a transfer from one to the other but I would say that probable cause here, because the informant did not say that he didn't provide any basis for saying that the goods were in that warehouse.

In other words he didn't say, "I saw them there". We couldn't have met that portion of the test where you have to number one, when you are getting a warrant on an informant's information, establish first his reliability, and second the source of his information. His source I would submit that the Government would not be in a position to adequately meet the source of the information part of the test because we would not be able to say that the informant had seen the goods there. He hadn't.

He just knew from where they were going to wherever they were located, and it was in the course of the afternoon that the events which took place colored the information which he gave, and gave probable cause for the arrest of Schneider.

THE COURT: All right. I'm going to deny the Government's motion. The basic policy in litigations when you have got a hearing or a trial is it's final Tucker creates an exception, but it's an exception grounded in the policy of necessary concealment;in some circumstances it's the identity of an informer.

Here what is concealed was not the identity but the existence of the informer, the existence of what they would have reported. I do not see in the Government's offer of proof anything in the

information that the FBI agent might testify to which would disclose circumstances leading to the identity of the informer and I find that this case simply does not fall within the Tucker policy.

I have got two other comments. One is that what was referred to as the quality of the testimony here what I thought were the conflicts of testimony disturbed me greatly. I may not emphasized them in my decision. I certainly did not rely entirely on them. I have given considerable thought to whether or not had the testimony which Mr. Schall indicates he would like to offer, had it been in the record at the time, would I have found probable cause or not?

I am inclined to think that I would not have done so. The point at which I have trouble with the agent's testimony is the point where Mr. Schneider comes out of the door. I said I believe that I didn't believe what Mr. Schneider said, but that doesn't mean that I don't believe what he said is true.

I just didn't believe Mr. Schneider period. I blotted him out of my weighing of the facts but I don't believe all the FBI agents either because they could not be all believed. They were in conflict and since the burden of proof would rest upon the

Government I could not make a finding in the Government's favor with respect to the incidents beginning at the time that Mr. Schneider left the garage with the box under his arm.

I said there were two points. One is the conflict of testimony, and the other is the fact I said I did not believe Schneider does not in fact mean I believed the contrary to what I said, so the motion is denied.

MR. HOCHHEISER: Thank you Your Honor.

MR. SCHALL: Your Honor, if I might just add, I assume in the Court's denial of the motions implicitly also is denial of our argument with respect to standing.

THE COURT: Yes.

MR. HOCHHEISER: You had specifically ruled on it.

THE COURT: I ruled on it on the first point. If they didn't have reason to enter the premises in the first place then they wouldn't have found the tools on the first floor. They had no reason to arrest upstairs and go upstairs, and there was no reason to search, and everything hinges in my analysis everything hinges upon the validity of the first entry into the building.

After that, everything falls into line. And since they didn't have the right to go in, in the first place, I say that everything else falls --

MR. SCHALL: My argument --

THE COURT: Not to be defeated on the technical ground of standing.

MR. SCHALL: In other words, you are rejecting our argument that the people upstairs can't complain about the validity of the entry in the dounstairs.

THE COURT: Yes, I am rejecting that.

MR. SCHALL: What we will do -- we have previously determined that an appeal on the basis of the record established at the September hearing would not be really fruitless as far as the Government is concerned.

The Government openings would be to appeal the denial of the motion to reopen the suppression hearing. We have thirty days to determine that, and as soon as we have made our decision I will communicate it to the Court and the defense counsel.

THE COURT: All right.

MR. BERNSTEIN: Your Honor, on behalf of both defendants Bannerman and Mengrone considering the posture of the case at this time, I am respectfully requesting that the extent that there was any travel

restrictions on either one of the defendants -- I respectfully request at this point that they be lifted.

MR. SCHALL: I won't object to that Your Honor.

THE COURT: All right, they are lifted.

MR. SCHALL: The bail remains, but the restriction is on movement.

MR. BERNSTEIN: Thank you very much.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- against - :

HERMAN BANERMAN, FRANK P. MENGRONE, KENNETH LEMANSKI, JOSEPH SCHNITZER, ERNEST MONTEVECCHI, VINCENT CIOFFI, and ARNOLD SCHNEIDER, :

Defendants. :

- X

ORDER

75 CR 945

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ NOV 22 1976 ★
TIME A.M.
P.M.

Motion having been made before me the 5th day of November, 1976, on behalf of the United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, by Alvin A. Schall, Assistant United States Attorney, for leave to reopen the suppression hearing in the above-captioned case, and for rehearing of the order of suppression previously entered in favor of the defendants Banerman, Cioffi, Lemanski, Mengrone and Schnitzer on the ground that said defendants have not established their standing to contest the validity of the search and seizure; and the Court having previously found that such defendants had standing to contest such search and seizure pursuant to ~~stipulation~~ concession by the United States Attorney and based upon the facts adduced at such hearing; it is hereby

GCP/USDJ

ORDERED, that the motion to reopen the suppression hearing is denied; and it is further

ORDERED, after a hearing on the motion for reargument, that the motion for rehearing is denied for the reasons stated in open Court on the 5th day of November, 1976.

Dated: Brooklyn, New York
November 22, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

W OFFICES
OF
CHHEISER
&
COHEN

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 12th day of January 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a APPELLANT'S APPENDIX of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

CARL D. BERNSTEIN, ESQ.
Kronen & Bernstein, Esqs.
485 Madison Ave.
New York, N.Y. 10022

Aaron Schacher, Esq.
32 Court Street
Brooklyn, N.Y. 11201

Hochheiser & Cohen, Esqs.
16 Court St.-Suite 1804
Brooklyn, N.Y. 11201

Frederick Abrams, Esq., 250 Broadway, N.Y. 10007
Emanuel Grownman, Esq., 176-60 Union Trnpike, Flushing, NY 11366

Evelyn Valenti

Sworn to before me this
12th day of Jan. 1977

Carolyn N. Johnson

NOTARY PUBLIC, State of New York
No. 41-[illegible]
Qualified in [illegible]
Term expires March 30, 1977